

Federal Court



Cour fédérale

Date: 20190314

Docket: IMM-3857-18

Citation: 2019 FC 311

Ottawa, Ontario, March 14, 2019

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

**OLUWAKEMI SHOLA AKANNIOLU,
OLUWAFEMI DAVID AKANNIOLU,
OOREOLUWA STEPHEN AKANNIOLU**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicants seek judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of the decision of the Refugee Appeal Division [RAD] dated July 20, 2018, which upheld the finding of the Refugee Protection Division [RPD]. The RPD found that the Applicants were not Convention refugees or persons in need of protection under sections 96 and 97 of the Act.

[2] For the reasons that follow, the application is dismissed.

I. Background

A. *The Applicants' Allegations*

[3] The Applicants, a family of three, are citizens of Nigeria, who seek refugee protection based on their claim that they face threats to their lives arising from Oluwakemi Shola Akanniolu's [the Principal Applicant] work for the Future Planners Initiative. This organization aims to advance protection for women and girls from sexual abuse in Nigeria and to expose their abusers.

[4] The Applicants claim they were threatened by persons who do not support the work of the Principal Applicant in seeking to raise awareness of sexual violence against women and girls. The Applicants also claim that the Badoo cult attacked them in their home and threatened them due to the Principal Applicant's advocacy work.

B. *The RPD Decision*

[5] The RPD found the Applicants' testimony about the Future Planners Initiative and their advocacy work to be credible. The RPD noted the publications of the Future Planners Initiative, including the books written by the Principal Applicant regarding child abuse, the seminars offered, and other awareness initiatives of the organization.

[6] However, the RPD found that the documents submitted by the Applicants in support of their claim that they were being persecuted and faced threats because of the Principal Applicant's work lacked credibility. As a result of finding various documents unreliable, likely fabricated and, at worst, fraudulent, the RAD attributed little or no weight to the documents.

[7] The RPD found that two letters from the Future Planners Initiative to the Permanent Secretary of the Lagos State Ministry of Women Affairs and Poverty Alleviation, which reported on a case of child molestation, were stamped "received" on pages 1 and 2 with different dates. The RPD found the letters to be likely fabricated.

[8] The RPD found that the Police Report and sworn affidavit of the Principal Applicant regarding a threat to her life arising from a home invasion to be unreliable and "at worst fraudulent". The RPD noted that the Police Report contained several spelling errors. The Principal Applicant's affidavit was found to misspell her own name and to replicate verbatim some passages from the police document.

[9] The RPD also found that the affidavit of Oluwafemi David Akanniolu [the Male Applicant], which attests to the home invasion by gunmen and the theft of items from the home, only corroborates the fact of the home invasion and theft, but does not corroborate the Applicants' allegation that the gunmen were targeting the Principal Applicant due to her work with the Future Planners Initiative.

[10] The RPD found that the affidavit of T.O., which also recounts the home invasion, was based on the Applicants' account and was of little probative value.

[11] The affidavit of L.B., which recounted an unrelated robbery of L.B. and the Principal Applicant, was found to have no bearing on the Applicants' allegations of threats.

[12] The RPD also found that the Applicants' fear of the Badoo cult was lacking in credibility.

[13] The RPD noted the Applicants' delay in leaving Nigeria following the alleged threats and their failure to seek asylum in the United States where they resided for a year. The RPD found that this undermined their credibility, noting that this behaviour is inconsistent with their allegation of fear and that someone was looking for them.

II. The Decision Under Review

[14] In the Applicants' appeal to the RAD they argued that the RPD breached procedural fairness by not confronting the Applicants with its concerns about their supporting documents and by not providing an opportunity for the Applicants to respond.

[15] The Applicants also sought to admit new evidence, specifically, an affidavit of the Principal Applicant which offered explanations for the inconsistencies and errors in the documents previously submitted, new versions of the same letters previously submitted with new date stamps, a new and corrected version of the Police Report, a transcript of a conversation

between the Principal Applicant and a young girl, a letter from the wife of the person allegedly abusing the young girl, and a more recent article regarding the Badoo cult.

[16] The RAD found that the new evidence was not admissible as it did not meet the criteria of subsection 110(4) of the Act or the factors set out in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385, [2007] FCJ No 1632 (QL) [*Raza*]. Given that new evidence was not admitted, the RAD refused to hold an oral hearing.

[17] The RAD found that the determinative issue was the credibility of the Applicants' allegations of threats in Nigeria.

[18] The RAD found that the RPD did not breach procedural fairness, noting that the RPD is not required to confront an applicant with inconsistencies in the documents submitted and relied on by that applicant.

[19] The RAD found that the Principal Applicant's new affidavit, which sought to explain the spelling errors, inconsistencies, and illogical date stamps in the original documents, was not sufficient to overcome the deficiencies, noting that some explanations were nonsensical.

[20] The RAD conducted its own analysis of the original documents and noted several problems. The RAD found that the documents called into question the credibility of the purported attack and threats.

[21] The RAD assessed the police report and the Principal Applicant's affidavit, which described the home invasion. The RAD agreed with the RPD's findings regarding spelling errors in key parts and headings, spelling errors in the Principal Applicant's own name and similar handwriting on both documents, which led the RPD to find the documents unreliable.

[22] The RAD noted that the affidavit from F.A.O., who was described as a "friend and guardian", describes the home invasion based on the Applicants' account and, as such, has little probative value.

[23] With respect to the affidavits from L.B. and T.O., the RAD found that these did not relate to the Applicants' claim of being targeted and threatened, nor did the affidavits outweigh the serious credibility concerns.

[24] The RAD concluded that the Applicants' allegations of threats due to the Principal Applicant's work, including the allegations regarding the Badoo cult, were not credible and that the Applicants' credibility was undermined by the documents they submitted. As a result, the RAD confirmed the RPD's finding that the Applicants are not Convention refugees or persons in need of protection.

III. The Issues

[25] The Application raises three issues:

1. Whether the RAD erred in refusing to admit their new evidence;
2. Whether the RAD erred in finding that the RPD did not breach procedural fairness; and

3. Whether the RAD reasonably found that the Applicants' allegations were not credible.

IV. The Standard of Review

[26] In *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 70, [2016] 4 FCR 157 [*Huruglica*], the Federal Court of Appeal clarified that the RAD conducts an appeal of the RPD's decision and reviews the RPD's findings on the standard of correctness. However, the RAD may defer to the RPD on credibility findings "where the RPD enjoys a meaningful advantage", for example, where the RPD has heard the testimony first hand.

[27] In reviewing a decision of the RAD, the Court applies the reasonableness standard with respect to the RAD's determinations of factual issues, including credibility, and issues of mixed fact and law (*Huruglica*, at paras 30-35). This includes determinations regarding the admissibility of new evidence (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 29, [2016] 4 FCR 230 [*Singh*]).

[28] The reasonableness standard focuses on "the existence of justification, transparency and intelligibility within the decision-making process" and considers "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

[29] Issues of procedural fairness are reviewable on a correctness standard (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339).

V. The Applicants' Submissions

[30] The Applicants argue that the RAD erred by not admitting the new evidence which they submit addressed the credibility concerns of the RPD. The Applicants submit that the new affidavit of the Principal Applicant explains why the documents could not have been provided in their current state to the RPD. The Applicants argue that the RAD further erred by not holding an oral hearing.

[31] The Applicants also argue that the RAD erred in finding that the RPD did not breach procedural fairness. The Applicants note that the RPD accepted that the Principal Applicant was an advocate for the protection of women and girls from sexual abuse and that her work exposed abusers. They submit that the credibility of their documents should have been regarded in that context.

[32] The Applicants submit that the RPD should have raised its concerns about the documents and that the Applicants should have been given an opportunity to respond.

[33] The Applicants note that the RAD cited jurisprudence regarding the factors to be considered by a decision-maker in determining whether there is a duty to confront an applicant with discrepancies in their evidence, and submit that the RAD failed to apply this jurisprudence. The Applicants point to *Ngongo v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 1627 (QL) at para 16, 94 ACWS (3d) 975 [*Ngongo*] and submit that it established a test that was not applied by the RPD or RAD.

[34] The Applicants also submit that the RAD's finding that they had not established the basis of their refugee claim—the allegations of threats, including from the Badoo cult, due to the Principal Applicant's advocacy work—is not reasonable.

VI. The Respondent's Submissions

[35] The Respondent submits that the RAD's decision is reasonable.

[36] The Respondent argues that the RAD correctly found that there was no breach of procedural fairness by the RPD. The Respondent notes that the jurisprudence has established that the duty of procedural fairness does not require applicants to be confronted regarding inconsistencies or other concerns arising from their own documents. The Respondent adds that the jurisprudence relied on by the Applicants (*Ngongo*) addresses how oral testimony should be assessed and how a reviewing court should determine if the decision-maker was overly microscopic in drawing adverse conclusions from oral testimony, for example, by focusing on minor inconsistencies. It is not about the assessment of written documents tendered by applicants.

[37] The Respondent emphasizes that, contrary to the Applicants' oral submissions, the RPD did not rely on any extrinsic evidence. All the documents which the RPD and RAD found problematic were submitted by the Applicants, who were aware of the contents.

[38] The Respondent further submits that the RAD did not err in refusing to admit new evidence. The Respondent notes that the Applicants are not entitled to provide new evidence to

correct or address deficiencies in their original evidence. Applicants must put their best foot forward at the RPD stage.

VII. The RAD's Decision is Reasonable

A. *The RAD did not err in refusing to admit the new evidence and, as a result, did not err in refusing to hold an oral hearing.*

[39] Subsection 110(4) of the Act provides:

110(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

110(4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

[40] In *Singh* at para 63, the Federal Court of Appeal emphasized that the RAD cannot disregard the clear statutory criteria of subsection 110(4). In addition, the factors established in *Raza* at paras 13-14 (credibility, relevance, newness, and materiality) remain applicable to determinations by the RAD to admit new evidence. The Federal Court of Appeal added that only evidence that meets the criteria set out in subsection 110(4) is admissible.

[41] The role of the Court is not to re-determine whether the new evidence should have been accepted, but to determine whether the RAD's finding that the new evidence did not meet the criteria is reasonable. The RAD provided clear reasons for refusing to admit the new evidence

with reference to the statutory criteria in subsection 110(4) of the Act and the application of the *Raza* factors.

[42] As the RAD noted, the Applicants did not provide a reasonable explanation for why the “new” documents—which for the most part were corrected or revised versions of the original documents—could not have been submitted to the RPD. The information was not new or newly discovered, merely revised. The RAD considered the Principal Applicant’s new affidavit, which sought to explain the inconsistencies. This affidavit stated that the Applicants did not draft the documents (including the affidavit submitted to the RPD) but had relied on third parties who made bureaucratic errors, and that they could not have known that the documents would include these errors. The RAD reasonably found that the explanations were not sufficient to permit the RPD to find that the criteria of subsection 110(4) were established.

[43] As the Federal Court of Appeal noted in *Singh*, at para 54:

The role of the RAD is not to provide the opportunity to complete a deficient record submitted before the RPD, but to allow for errors of fact, errors in law or mixed errors of fact and law to be corrected.

[44] The RAD also reasonably found that the article on the Badoo cult did not meet the criteria for the admission of new evidence established in *Raza* and was inadmissible. The RAD found that the article did not offer any insight into the Badoo cult that had not been considered by the RPD and that the information was not particular to the Applicants.

B. *The RAD did not err in finding that the RPD did not breach procedural fairness*

[45] The RAD correctly found that there was no duty on the RPD to confront the Applicants with the RPD's concerns regarding their own documents.

[46] In *Moïse v Canada (Citizenship and Immigration)*, 2019 FC 93, [2019] FCJ No 72 (QL) [*Moïse*], Justice LeBlanc reiterated the well-established law at paras 9-10, noting the distinction between an applicant's own evidence and extrinsic evidence:

9. The case law of this Court is unambiguous: the rules of procedural fairness do not require refugee claimants to be confronted about information that they are aware of and which they have, in addition, provided themselves (*Gu v Canada (Citizenship and Immigration)*, 2017 FC 543 at para 29; *Aguilar v Canada (Citizenship and Immigration)*, 2012 FC 150 at para 31; *Mohamed Mahdoon v Canada (Citizenship and Immigration)*, 2011 FC 284 at para 22; *Lawal v Canada (Citizenship and Immigration)*, 2010 FC 558 at para 17; *Azali v Canada (Citizenship and Immigration)*, 2008 FC 517 at para 26).

10 It is an entirely different situation when extrinsic evidence is used against the refugee claimant and the claimant is not confronted about this information. That is not the case here. The medical certificate at issue was included with the documentation submitted by the applicant in support of his claim for refugee protection. Therefore, we cannot reproach the RPD for failing to confront him about the discrepancy revealed by this medical certificate, concerning the exact date on which he claims to have been attacked in January 2006.

[47] In *Gu v Canada (Citizenship and Immigration)*, 2017 FC 543 at para 29, [2017] FCJ No 600, the Court emphasized the same well-established principle recently reiterated in *Moïse*:

The RPD was not required to confront the applicants with this discrepancy; the principles of procedural fairness do not require the Board to confront the applicant with information that they had

supplied themselves: *Aguilar v Canada (Minister of Citizenship and Immigration)*, 2012 FC 150, [2012] FCJ No 146 at para 31.

[48] At the hearing of this Application, the Applicants directed the Court to several cases that note that extrinsic evidence should be brought to the attention of an applicant, that affidavits should not be discounted only because they come from family members, and that documents should not be discounted only because they contain typographical errors. However, none of the cases noted by the Applicants relate to the documents or the determinative issues in this case.

[49] The Applicants also suggested that the Male Applicant and Ooreoluwa Stephen Akanniolu [the Minor Applicant] should not be jeopardized by the RPD's and RAD's findings regarding the evidence provided by the Principal Applicant. The Applicants suggested that this evidence could be characterized as extrinsic evidence vis-à-vis the Male Applicant and Minor Applicant and that they should have been given an opportunity to respond to the concerns of the RPD regarding this evidence. I completely disagree. This argument is based on a misunderstanding of extrinsic evidence. This argument also ignores that the Male Applicant and the Minor Applicant rely on the same narrative and the same evidence of the Principal Applicant; their claims are joined. Moreover, the Male Applicant submitted an affidavit recounting the same alleged home invasion. The evidence submitted by the Applicants applies to all of them. It is not extrinsic evidence. The Applicants are expected to know the content of their own evidence and are not entitled to have the decision-maker point out concerns and provide an opportunity for the applicants to respond.

C. *The RAD did not err in finding that the Applicants' allegations were not credible*

[50] The RAD conducted its own assessment of all the evidence and reasonably concluded that the documents lacked credibility and could not support the Applicants' allegations of threats from unidentified persons who the Applicants claimed targeted them due to the Principal Applicant's advocacy or from the Badoo cult. The RAD found that the documents were unreliable for several reasons, including inconsistent date stamps, spelling errors in key areas of the police document and errors in the Principal Applicant's affidavit. As a result, the RAD found that the documents were not credible. Other affidavits were found not to address the credibility of the Applicants' claims but simply to recount what the Applicants had stated. The RAD considered the explanations offered by the Principal Applicant in her new affidavit and reasonably concluded that the explanations were not sufficient to overcome the problems noted and that some explanations were simply nonsensical.

JUDGMENT in IMM-3857-18

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed.
2. There is no question for certification.

"Catherine M. Kane"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3857-18

STYLE OF CAUSE: OLUWAKEMI SHOLA AKANNIOLU, OLUWAFEMI
DAVID AKANNIOLU, OOREOLUWA STEPHEN
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