Federal Court  Cour fédérale

Date: 20201026

Docket: IMM-5106-19

Citation: 2020 FC 1009

Ottawa, Ontario, October 26, 2020

PRESENT: The Honourable Madam Justice Fuhrer

BETWEEN:

BIOLA FALILAT FABUNMI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ms. Biola Falilat Fabunmi and her daughter fear persecution and harm on the basis of their sexual orientations; they are citizens of Nigeria who claim they are bisexual and that they had same-sex relationships in Nigeria. They also claim that in-laws, community vigilantes and police are searching for them in Nigeria. The Refugee Appeal Division [RAD], like the Refugee Protection Division [RPD] before it, found Ms. Fabunmi and her daughter were

not credible because of inconsistencies in their evidence, and concluded they were neither Convention refugees nor persons in need of protection. They sought judicial review of the RAD's decision.

[2] Ms. Fabunmi's daughter was a co-applicant until this Court ordered the daughter removed, further to the Notice of Discontinuance served and filed in December 2019. Ms. Fabunmi thus is now the sole Applicant. The RAD's decision concerning the daughter no longer is in issue before this Court, contrary to the submission of the Applicant's counsel at the hearing of this matter (held by teleconference in light of COVID-19).

[3] The main issue for consideration is whether the RAD's decision was unreasonable and procedurally unfair. I disagree with the Applicant that the RAD: (i) breached procedural fairness by making new credibility findings without affording the Applicant a hearing; (ii) erred in its final decision after finding the RPD erred in several of its implausibility findings; (iii) improperly assessed the documents before it; and (iv) erred by failing to conduct a separate section 97 analysis (under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]). I therefore dismiss this judicial review application, for the reasons that follow.

II. Standard of Review

[4] The presumptive standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 10. It is not a "rubber-stamping" exercise, but rather a robust form of review: *Vavilov*, above at para 13. A reasonable decision must be "based on an internally coherent and rational chain of analysis" and it must be justified

in relation to the factual and legal constraints applicable in the circumstances: *Vavilov*, at para 85. Courts should intervene only where necessary. To avoid judicial intervention, the decision also must bear the hallmarks of reasonableness – justification, transparency and intelligibility: *Vavilov*, at para 99. The Court must avoid reassessing and reweighing the evidence before the decision maker; a decision may be unreasonable, however, if the decision maker "fundamentally misapprehended or failed to account for the evidence before it": *Vavilov*, above at paras 125-126. The party challenging the decision has the onus of demonstrating that the decision is unreasonable: *Vavilov*, at para 100.

[5] Breaches of procedural fairness in administrative contexts have been considered reviewable on a correctness standard or subject to a "reviewing exercise … 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied": *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54. The duty of procedural fairness "is 'eminently variable', inherently flexible and context-specific"; it must be determined with reference to all the circumstances, including the *Baker* factors: *Vavilov*, above at para 77. In sum, the focus of the reviewing court is whether the process was fair.

III. Analysis

i) *Did the RAD breach procedural fairness by making new credibility findings without affording the Applicant a hearing?*

[6] In my view, the RAD did not make new credibility findings warranting a hearing, absent evidence permitted pursuant to IRPA s 110(4). Contrary to the Applicant's submission, this is clear in paragraph 14 of the RAD's decision: "I will briefly touch upon the [RPD's] findings that

the Appellants have challenged on appeal and those [of the RPD's findings] that I have independently found to be in error before I analyze the [RPD's] strong findings." I consider the bracketed wording that I added implicit in the RAD's statement. It is clear from this "roadmap," and from the RAD decision as a whole, that the RAD addressed the matters in issue before the RPD. It did not raise a new issue but "rather it was addressing the very issue raised by the applicant": *Ibrahim v Canada (Citizenship and Immigration)*, 2016 FC 380 [*Ibrahim*] at para 30.

[7] When the credibility of a refugee applicant is at the heart of the RPD's decision and the grounds of appeal before the RAD, "the RAD is entitled to make independent findings in this regard, without having to question the applicant or giving the applicant another opportunity to make submissions": *Corvil v Canada (Minister of Citizenship and Immigration)*, 2019 FC 300 at para 13.

[8] As part of its correctness review, the RAD was obligated to review and assess the evidence anew which in my view it did: *Zhao v Canada (Citizenship and Immigration)*, 2019 FC 1593 at para 33. Unless it is clearly explained why the RPD enjoys a meaningful advantage in assessing an applicant's credibility, the RAD must conduct its own credibility assessment, which I also find it did in this case: *Manan v Canada (Citizenship and Immigration)*, 2020 FC 150 at para 38. Further, "[t]he fact that it saw some of the evidence differently [or, in my view, confirmed a negative credibility finding with a more logical or rational chain of analysis] is not a basis to challenge the decision on fairness grounds when no new issue was raised": *Ibrahim*, above at para 30; *Iqbal v Canada (Citizenship and Immigration)*, 2020 FC 170 at para 55. In the

case before me, the Applicant has challenged the RAD's findings without explaining why the RPD has a meaningful advantage over the RAD in assessing credibility in the circumstances.

[9] In any event, the "new credibility findings" alleged by the Applicant pertain to the Applicant's daughter who no longer is a party to this proceeding. Accordingly, I need not address the issue further.

ii) *Did the RAD err in its final decision after finding the RPD erred in several of its implausibility findings?*

[10] I am not persuaded that the RAD erred as argued on this point. The Applicant submits that the RAD arrived at its decision, basing it on inconsistencies and implausibilities found by the RPD. Further, the RAD should have sent the matter back to the RPD for redetermination, "knowing full well it was not preview to the oral testimony of the Applicants, rather than assume based on these faulty implausibility findings." In my view, however, when the RAD finds an error with the RPD's decision, it can confirm the decision on another basis: *Canada (Citizenship and Immigration) v Huruglica,* 2016 FCA 93 [*Huruglica*] at para 78. As discussed below, I find that the RAD's correctness determinations are "based on an internally coherent and rational chain of analysis" such that they are intelligible, transparent and justified.

[11] Though IRPA s 111(1) contemplates redetermination, among the three options for decision making available to the RAD, IRPA s 111(2) limits the RAD's ability to do so. The latter provision prescribes a two-part conjunctive test for a redetermination finding. The RAD must be of the opinion that: first, the RPD erred in law, fact or mixed fact and law; **and** second,

the RAD cannot confirm the RPD's decision, set it aside or substitute its own decision without hearing the evidence presented to the RPD.

[12] As Justice Gauthier explained, IRPA s 111(2) is based on the principle that there are cases where the RPD enjoys a meaningful advantage over the RAD in making findings arising out of the oral evidence: *Huruglica,* above at para 70. On the other hand, Justice Gauthier also made it clear that in each case, there is a two-step test to meet: "…the RAD ought to determine whether the RPD truly benefited from an advantageous position, and if so, whether the RAD can nevertheless make a final decision in respect of the refugee claim": *Huruglica*, above at para 70. Justice Gauthier clarified that the RPD may have no real advantage over the RAD if the RAD can identify an error based on common sense, such as in cases where a claimant was not found credible because their story was not plausible: *Huruglica*, above at para 72.

[13] The first part of the IRPA s 111(2) test was met in the case before me when the RAD found that the RPD erred in making the following implausibility findings regarding the Applicant, and explained why:

1) the Applicant feeling happy and positive about realizing she was bisexual - the RAD stated that the process of self-discovery is a very personal one;

2) the varied spelling of the name of the Applicant's alleged same-sex partner was implausible and not supported by documentary evidence - the RAD was not sure to what kind of documentary evidence the RPD was referring because the RAD found that the three forms of the partner's name are in common use in Nigerian cultures; and

3) the Applicant's minor injuries, whereas her husband died, because of an alleged attack by a group of boys while she was driving with her husband resulting in the car rolling over

and crashing; the gang then lit the car on fire, shouting gays and lesbians were not wanted - the RAD found the RPD has no expertise in car crash reconstruction and therefore no reliable way of assessing the plausibility of this evidence.

[14] In my view, however, the second part of the IRPA s 111(2) test was not met. The RAD concluded, after reviewing the entirety of the transcript for all three hearing dates, the evidence and the RPD record, that the RPD had no meaningful advantage. The RAD thus proceeded with its IRPA s 111(1) mandate. In this case, the RAD confirmed the RPD correctly assessed the following inconsistencies that were material (with one possible exception) to the Applicant's claim and hence, the RPD was correct that the Applicant's testimony and documentary evidence lacked credibility; again, the RAD explained why:

1) *Canadian Visa Applications*: The Applicant (and her daughter) applied for Canadian visas. The information in the visa applications regarding siblings and the Applicant's children is inconsistent with the information in the refugee claims. The RAD found the two documents appear to refer to completely different people, meaning that at least one of the documents contained fraudulent or omitted information. The RAD also noted that, when questioned at the RPD hearing, the Applicant replied her brother and a travel agent helped them prepare the visa applications. She could not explain why the information was incorrect. The RAD found that the visa applications were "part of the constellation of evidence central to establishing [their] identities and relationships with family members, which [they] testified are highly relevant to their claims." Even if this were a peripheral issue, the RAD concluded it still would be a minor part of the overall conclusion that the Applicant's evidence was highly inconsistent and therefore unreliable.

2) *Applicant's Relationship with Alleged Same-sex Partner* (whose name has varied spelling): The Applicant alleged, in her Basis of Claim or BOC narrative and her testimony, that they met in January 2012 while Ms. Fabunmi was working as a hairdresser at Midas Touch Salon; documentary evidence, however, pointed to Ms.

Fabunmi working or training at Midas Touch Salon in 2003-2004, a difference of 8 or 9 years. When asked about the inconsistency, she replied that she forgot the correct date. The RAD found this a serious material inconsistency central to the Applicant's claim. Ms. Fabunmi testified that the relationship lasted approximately 4 years and ended shortly before the alleged attack against Ms. Fabunmi and her husband that occurred in early 2016.

3) *UK Visa Applications*: In her BOC, Ms. Fabunmi also alleged that she applied for two UK visas in 2012 and 2015 in order to meet up with her same-sex partner but the applications were denied. UK biometric evidence, however, pointed to the applications having been made in 2010 and 2013 instead. The RAD found the latter evidence reliable and the discrepancy problematic: if the 4-year relationship commenced in 2003-2004, it would have been long over by 2010; if, however, the relationship commenced in 2012, the first UK visa application would have been made two years before Ms. Fabunmi even met her alleged same-sex partner. When the RPD confronted Ms. Fabunmi with these inconsistences, she responded she forgets issues and did not remember. The RAD found the explanation unacceptable because these two issues go to the nature of the relationship that led to the Applicant's alleged persecution in Nigeria. The RAD therefore concluded that on a balance of probabilities, there was no romantic relationship as described by the Applicant.

4) *Attack on Ms. Fabunmi and Her Husband*: In her BOC narrative, Ms. Fabunmi describes that after she and her same-sex partner last saw each other in December 2015, the partner reconnected with an ex-girlfriend whose husband caught them having sex. The husband arranged for the gang of boys to attack Ms. Fabunmi and her husband; the partner was in hiding from the same man at the time of the attack. Documentary evidence comprised of a letter from the Riverdale Immigrant Women's Centre, however, describes that the attack was arranged by the same-sex partner who was jealous of the time the Applicant was spending with her family, based on information provided by Ms. Fabunmi. The Applicant was unable to explain why the inconsistency existed, and related testimony was vague and confusing.

The RAD found the inconsistency material because it goes to the core of the alleged danger faced in Nigeria. The RAD also noted that the RPD received no corroborating evidence of the death of Ms. Fabunmi's husband, nor their hospital stays, and no explanation why the evidence was not available. I note Ms. Fabunmi had time and opportunity to obtain the documentation - the RPD hearing spanned three days, commencing in November 2017, one year after she arrived in Canada, and ending in August 2018: *Canadian Association of Refugee Lawyers v Canada (Citizenship and Immigration)*, 2019 FC 1126 at para 184; *Fatoye v Canada (Citizenship and Immigration)*, 2020 FC 456 at para 35.

5) *Hiding from Police and Community*: Ms. Fabunmi's testimony and BOC narrative differed concerning when the police came looking for her. For example, she testified that: it was made public; she found out from her maid; she found out from her former same-sex partner. In her BOC narrative, however, she described that her brother told her when they were heading to the airport to leave Nigeria. Further, the accounts of both Ms. Fabunmi and her daughter of when, where and why they went into hiding were inconsistent.

[15] The RAD therefore confirmed the decision that the Applicant is not a Convention Refugee nor a person in need of protection. (These confirmations also applied to the Applicant's daughter who no longer is a party to this judicial review application.) Apart from the RPD's errors that the RAD identified, the numerous inconsistencies in the evidence were obvious and sufficiently central to permit the RAD to confirm the correctness of the RPD's other findings.

iii) *Did the RAD improperly assess the documents before it?*

[16] This issue relates more specifically to the Canadian visa applications and the documentary evidence concerning the Applicant's employment or training at Midas Touch Salon from 2003-2004. I am not persuaded that the RAD improperly assessed either set of evidence.

[17] As I noted in point 1) under paragraph 14, the RAD found that in light of the inconsistent information regarding siblings and the Applicant's children as between the Canadian visa applications and the refugee claims, **at least one of the documents contained fraudulent or omitted information**. I find this conclusion is somewhat speculative and, on the whole, unnecessary. That said, it does not detract, in my view, from the reasonableness of the RAD's consideration of this evidence, the uncontradicted finding of inconsistency, and the lack of explanation why the information was incorrect.

[18] The Applicant argues, however, that the use of fraudulent documents to escape persecution is peripheral to any claim, citing *Rasheed v Canada (Citizenship and Immigration)*, 2004 FC 587 [*Rasheed*] and *Fajardo v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 915. While I do not disagree with this general principle, in my view it does not apply to the circumstances of the case before me. First, the inconsistent information pertains to family members as opposed to the Applicant's own identity. This matter does not involve an applicant who lied about their own identity or entered Canada using fraudulent **foreign** documents, as occurred in *Rasheed*. Second, the Applicant did not make the argument before the

RAD, and thus, it is not proper to advance it in this judicial review. I agree with the Respondent that it is tantamount to a request to reconsider and reweigh this evidence.

[19] Regarding the Applicant's employment or training at Midas Touch Salon from 2003-2004, I find the RAD's articulation of its concerns (in points 2) and 3) under paragraph 14 above) intelligible, transparent and justified. Contrary the Applicant's argument before this Court, inconsistencies between different types of evidence, including testimony, permit the decision maker to draw adverse credibility findings: *Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 at para 21, citing Lin v Canada (Citizenship and Immigration), 2010 FC 183 at para 19.

[20] The Applicant argued that "oral testimony is generally allowed to provide additional details of a claimant's narrative and it should not be a basis for impugning credibility," citing *Selvakumaran v Canada (Citizenship and Immigration)*, 2002 FCT 623 [*Selvakumaran*] at para 20 (incorrectly identified as paragraph 21 in its written submissions). The court qualified this principle, however, as follows: "the case law has allowed that oral testimony may provide details not included in the PIF [Personal Information Form], and that this will not serve to impugn the applicant's credibility **unless the incident omitted is a significant one to the claim**" [emphasis added]: *Selvakumaran*, at para 20. Contrary to the circumstances of the case before me, the court in *Selvakumaran* concluded in the same paragraph that "[n]ot only is the evidence in the applicant's PIF consistent with his oral testimony, but the missing details are not significant." Contrary to the Applicant's argument, I am not persuaded that the case before me involves a failure by the RAD to take into account material evidence or to overlook a piece of relevant

evidence. I therefore am not prepared to find unreasonable the RAD's reconsideration of the applicable evidence and testimony, and its conclusions, concerning the applicant's relationship with the alleged same-sex partner and the UK visa applications.

iv) *Did the RAD err by failing to conduct a separate section 97 analysis?*

[21] I am not persuaded that the RAD erred in this respect. The gist of the Applicant's argument appears to be that because the analysis under sections 96 and 97 of the IRPA differ, separate treatment is warranted; the RPD's and RAD's failure to do so in this case resulted in procedural unfairness. The Respondent, on the other hand, argues that there is no obligation for the RAD to conduct a further section 97 analysis because the Applicant's arguments were the same under section 96: *Kaur v Canada (Citizenship and Immigration)*, 2012 FC 1379 at para 51. The RPD, having considered the Applicant's claim that she was at risk as a result of her bisexuality in Nigeria and found that it lacked credibility, was not required to conduct an additional section 97 analysis. I agree.

[22] Drawing from *Canada (Citizenship and Immigration) v Sellan*, 2008 FCA 381 at paras 2-3, the Court previously has held that "the RAD and the RPD are not obligated to undertake a section 97 analysis when faced with a case where the claimant lacks credibility": *Chinwuba v Canada (Citizenship and Immigration)*, 2019 FC 312 at para 31; *Huseynov v Canada (Citizenship and Immigration)*, 2019 FC 1392 at paras 7 and 19; *Ikeme v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 21 at paras 40-42; and *Alkurd v Canada (Citizenship and Immigration)*, 2019 FC 298 at para 27. I see no reason to depart from this line of cases in the present circumstances.

IV. Conclusion

[23] I therefore find that the Applicant has failed to discharge her onus of demonstrating that the RAD's decision is unreasonable. I also find that the RAD's decision was procedurally fair. Neither party proposed a serious question of general importance for certification and thus, I further find that none arises.

JUDGMENT in IMM-5106-19

THIS COURT'S JUDGMENT is that this judicial review application is dismissed, and there is no serious question of general importance for certification.

"Janet M. Fuhrer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Jerome Olorunpomi	FOR THE APPLICANT
Idorenyin Udoh-Orok	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jerome Olorunpomi Legal Aid Ontario Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT