

Federal Court



Cour fédérale

Date: 20230918

Docket: IMM-8614-22

Citation: 2023 FC 1250

Ottawa, Ontario, September 18, 2023

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

**MARIA OLASUNKANMI KUKOYI
ISRAEL OLAOLUWA KUKOYI
JEREMIAH OLAKUNLE KUKOYI**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is the judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada which upheld the decision of the Refugee Protection Division [RPD] finding that the Applicants are not Convention refugees or persons in need of protection under s 96 and s 97, respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c27 [IRPA].

[2] For the reasons that follow, I find that the application must be dismissed as the RAD did not err in its determinative credibility finding and its decision was reasonable.

Background

[3] Maria Olasunkanmi Kukoyi [Principal Applicant] and her two minor children [Minor Applicants] are citizens of Nigeria [together, the Applicants]. The Principal Applicant is the designated representative of the Minor Applicants. In her Basis of Claim [BOC] narrative, the Principal Applicant claimed that her father died in 2008 and that between 2010 and 2018 her two half sisters harassed and threatened her and her family. The half sisters sought to obtain documents concerning her late father's home in order to force its sale and obtain part of the property proceeds.

[4] On November 30, 2019, the Principal Applicant updated her BOC. She alleged that her sister Ranke had informed her that another sister, Yemisi, had been kidnapped by the half sisters in Nigeria in March 2019 and the half sisters held her captive for a month. Ranke informed the Applicant that the half sisters had reported they were looking for the Principal Applicant.

[5] The Applicants and the Principal Applicant's husband traveled to the United Kingdom [UK] in September 2015, where they stayed for three weeks before returning to Nigeria. They did not seek asylum in the UK. In August 2016, the Principal Applicant obtained a visitor's visa for the United States [US], and travelled there in July 2017 with her sons. The Applicants stayed in the US for three months before returning to Nigeria. They did not claim refugee protection in the US. In April 2018, the Applicants returned to the US before irregularly crossing into Canada

on April 11, 2018. They claimed refugee protection in Canada on May 8, 2018. The Applicants assert that they fled Nigeria because of their fear of persecution by the half sisters.

[6] The RPD denied their claim by a decision dated January 4, 2021.

[7] The RPD found that the determinative issue was credibility. Because of contradictions in the Principal Applicant's testimony and her behaviour, the RPD found that she failed to establish, on a balance of probabilities, the credibility of her allegations. The Applicants appealed the decision of the RPD to the RAD.

Decision Under Review

[8] The RAD found that the RPD did not err in its determination that the Applicants are neither Convention refugees nor persons in need of protection and that the determinative factor regarding the application of both section 96 and subsection 97(1) of the *IRPA* was credibility. It dismissed the appeal and confirmed the decision of the RPD. The RAD agreed that the Principal Applicant's failure to claim protection in the UK and the US, and her reavilment to Nigeria, undermined her credibility.

[9] The RAD agreed with the Applicants that the RPD erred in finding that her failure to update her BOC until eight months after the alleged kidnapping of her sister undermined her credibility. However, it found that the failure of her husband to relocate was not consistent with the Principal Applicant's testimony that his life was at risk from the half sisters, or with that of someone who feared discovery, and that this undermined the Principal Applicant's credibility.

The RAD also found that the presumption of truthfulness had been rebutted by the Principal Applicant's actions and it did not accept her explanations as to why she had not provided corroborative evidence of the alleged kidnapping of her sister.

[10] Further, the RAD found that the Principal Applicant's claim, when testifying before the RPD that the half sisters were targeting her specifically because they believed she had inherited her father's house, was significant and material to her claim. Its omission from her BOC was not reasonably explained and undermined her credibility.

[11] Finally, the RAD did not accept that the RPD erred in finding that no nexus existed linking the Applicants' claim to a Convention ground and rejected the Applicants' submission on appeal that a nexus lies in the Principal Applicant's membership in a particular social group – her family.

Issue and Standard of Review

[12] Although the Applicants identify a number of issues, they all fall under the umbrella issue of whether the RAD's decision was reasonable.

[13] The parties submit and I agree that the standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] at paras 23 and 25). On judicial review, the Court “asks whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov* at para 99).

Analysis

Credibility

[14] The RPD and the RAD both found that the determinative issue in deciding the Applicants' claim was credibility.

[15] The Applicant asserts that the RAD made a number of errors in its credibility assessment, including that:

- the RAD failed to take into consideration that a claimant's testimony is presumed to be true unless there are serious reasons to doubt such testimony (*Maldonado v Canada* 1994 FCJ No. 72);
- the RAD refused the Applicants' claim because they did not make claims in the US or the UK but the failure to claim in another country is not a basis to refuse a claim and the Applicants provided a reasonable explanation for seeking protection in Canada, rather than the UK and the US;
- the RAD erred in concluding that the reavilment of the Applicants to Nigeria meant that they lacked subjective fear. Reavilment itself is not a sufficient ground to refuse a claim, especially in the face of the explanations offered by the Applicants;
- the RAD erred by taking the Principal Applicant's level of education into consideration when assessing her decision not to seek protection in the UK or the US;

- the RAD erred in impugning the credibility of the Applicants because the Principal Applicant did not provide documentation from her sister to corroborate her testimony that her sister was kidnapped. The RAD also made an unfounded implausibility finding in this regard;
- the RAD erred by impugning the credibility of the Applicants on the basis that the Principal Applicant's husband remains in Nigeria, given their explanation for this. It also erred in this finding because why the husband was not persecuted is only known to his agents of persecution; and
- the RAD erred by impugning the credibility of the Principal Applicant based on the omission from her BOC of her claim that she was specially targeted by the half sisters. She asserts that she was simply providing this information in response to a question from the RPD and this amounted to only more information and detail about an issue that was already before the RAD.

[16] I do not agree with the Applicants that the RAD erred in its credibility findings.

[17] As the Applicants submit, there is a presumption that when refugee claimants swear to the truth of their allegations, they should be taken as true, unless there are reasons to doubt their truthfulness. I would add that jurisprudence from this Court indicates that those reasons include where the evidence is inconsistent with the applicant's sworn testimony, or where the RAD is unsatisfied with the explanations for those inconsistencies (*Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 [*Lawani*] at para 21; *Udemba v Canada (Citizenship and*

Immigration), 2021 FC 1215 at para 20 and *Singh v. Canada (Citizenship and Immigration)*, 2022 FC 1309 at para 26). Further, the accumulation of contradictions, inconsistencies and omissions regarding crucial elements of a refugee claim can also support a negative conclusion about an applicant's credibility (*Lawani* at para 22).

[18] The RAD found that it was contradictory for the Applicants to reavail to Nigeria without trying to claim asylum in the UK or in the US, while simultaneously claiming to fear for their lives due to the threat of the Principal Applicant's half sisters. It noted that the Principal Applicant did not address her failure to seek protection in the UK. The RAD also did not accept her explanation that when she arrived in the US she felt that the immigration policies of then President Trump meant that she had little chance of a claim for protection being accepted and that she was in a fragile emotional state leading her to make the "erroneous" decision to return to Nigeria.

[19] The RAD did not accept that the Principal Applicant, who is well educated and who carefully researched the requirements for visas to the US determining that a short prior family vacation to the UK would serve to establish a travel history that would optimize the chances of obtaining a US visitor visa, was simultaneously so confused that she failed to notice the international media coverage concerning Trump's immigration policies prior to departing for the US in July 2017.

[20] The RAD also rejected the Principal Applicant's explanation that her failure to claim in the US was the product of a disordered mind and not indicative of a lack of subjective fear. The

RAD noted that she produced no evidence to substantiate that, any time, she suffered from a disordered state of mind. Her failure to seek protection was also incompatible with her claim of increasing fear of her half sisters.

[21] While the Applicants rely on *Jumbe v. Canada* (MCI), 2008 FC 543 [*Jumbe*], to assert that the RAD erred, in my view this decision does not assist them. In *Jumbe*, the Court found that it was not enough for the RPD to simply state that the failure to claim elsewhere, in and of itself, proved an absence of subjective fear. Put otherwise, the jurisprudence of this Court has held that the failure to claim elsewhere is not, in and of itself, determinative of a claim. Instead, the RPD must carefully consider any explanation provided by the applicant and give reasons for rejecting it (*Salman v. Canada (Immigration, Refugees and Citizenship)*, 2022 FC 984 at para 29). Here the RAD did just that. It did not simply find that the failure to claim protection in the UK and the US was the basis for the rejection of their claim, as the Applicants assert. Rather, the RAD reasonably drew a negative inference as to the Principal Applicant's lack of subjective fear and credibility based on its consideration of the record before it. It also considered – but did not accept – the Principal Applicant's explanation for returning to Nigeria. No error arises.

[22] The RAD also found that the Principal Applicant's allegations regarding her sister's kidnapping were not credible due to the absence of supporting evidence as well as the fact that the Principal Applicant's husband continued to live, unharmed, in the same town as the half sisters.

[23] In reaching that finding, the RAD noted that the Principal Applicant did not provide corroborating affidavits or letters from her sisters about the kidnapping. Her testimony before the RPD was that she did not know this was something she could do. Further, she was asked by the RPD why she had not disclosed the text messages, which she alleged her sister had sent to her advising that their other sister had been kidnapped. The Principal Applicant's testimony was that she did not know how to print texts from a phone but that she still possessed the texts on her phone and offered to produce them – but failed to do so. The RAD found that the Principal Applicant's testimony as to why she did not ask her sisters to provide letters or affidavits to be evasive. It also did not accept her explanation that she did not know she could disclose such information, given that as she was represented by experienced counsel. The RAD concluded that the failure to provide information to substantiate the alleged kidnapping undermined her credibility.

[24] As to the RPD's findings concerning the Principal Applicant's husband's failure to relocate, the RAD agreed that this behaviour was inconsistent with that of someone fearing for his life and that this undermined the Principal Applicant's credibility. The RAD noted that the Principal Applicant's husband continues to live in Ketu, the same town in Legos State where the alleged agents of persecution live. The RAD considered the Principal Applicant's explanation that her husband had not been granted a visa to the US and had failed to find employment in Benin. However, it found that the decision to return to Ketu was not consistent with the Principal Applicant's testimony that she and her husband were both equally imperilled by the half sisters. Further, the husband's failure to relocate also generally undermined the allegations that fear of the half sisters compelled the family to flee to another town in Nigeria and then to the US.

[25] As the Respondent submits, this Court has held that it is an error to make an adverse credibility finding solely on the basis of the absence of corroborative evidence. However, where there is a valid reason to doubt the claimant's credibility or where the claimant's story is implausible, the lack of documentary evidence can be a valid consideration for the purposes of assessing credibility if the applicant is unable to provide a reasonable explanation for the lack of corroborative evidence. The RPD or RAD is also entitled to take into account a claimant's lack of effort to obtain corroborative evidence to establish the elements of their claim and to draw a negative inference from this (*Luo v Canada (Citizenship and Immigration)*, 2019 FC 823 at para 20).

[26] Here, the RAD explicitly found that the presumption of truth had been rebutted by the Principal Applicant's actions. Thus, it was open to the RAD to expect the Principal Applicant to provide reasonably available corroborating evidence. Nor was the RAD compelled to accept the Principal Applicant's explanation for why her husband chooses to continue to live in Ketu and, in my view, the rejection of that explanation was entirely reasonable in light of the evidence before it. It was also not unreasonable for the RAD to reject the Principal Applicant's explanation for failing to provide or to disclose reasonably available corroborative evidence to support her assertion of the alleged kidnapping. Her failure to do so supported its negative credibility finding.

[27] The RAD also found that the Principal Applicant's credibility was undermined by her omission from her BOC of her allegation, made when testifying before the RPD, that she was specifically targeted by the half sisters because they believed, as her father's favourite, that she

had inherited his house. While the Applicants argued that the omission did not affect the substance of their claim, the RAD found that the new allegation was a significant and material aspect of her claim and that the Principal Applicant had been unable to provide an explanation for the omission in her testimony before the RPD.

[28] In my view, and as the Respondent submits, the jurisprudence is clear that all important facts of an applicant's claim are to be included in the BOC. A failure to do so, without reasonable explanation, can result in a negative credibility finding (*Ogaulu v Canada (Citizenship and Immigration)*, 2019 FC 547 at para 18 citing *Zeferino v Canada (Minister of Citizenship and Immigration)*, 2011 FC 456 at para 31; *Oketokun v. Canada (Citizenship and Immigration)*, 2022 FC 232 at para 17). Nor do I agree with the Applicants that the new allegation of specific targeting of the Principal Applicant was merely providing detail her existing claim.

[29] In summary, the RAD considered the submissions and the evidence in the record before it – which amply supported its negative credibility findings. While the Applicants do not agree with the RAD's credibility findings, they have failed to identify a reviewable error. Instead, in essence, they invite the Court to reweigh the evidence. However, that is not the role of the Court on judicial review and the RAD's credibility findings are to be afforded deference (*Vavilov* at para 125; *Shalaiev v. Canada (Citizenship and Immigration)*, 2022 FC 457 at para 40; *Benavides v. Canada (Citizenship and Immigration)*, 2021 FC 43 at para 60).

[30] The Applicants make numerous other submissions, which I will address briefly given that the RAD's credibility finding was determinative.

Minor Applicants

[31] The Applicants submit that the RAD erred in failing to assess the Minor Applicants' failure to claim protection in the UK and the US through the lens of their age. There is no merit to this submission. The Principal Applicant was the designated representative of the Minor Applicants whose claims relied on her BOC. They did not submit their own BOC narratives and did not give evidence. In the result, the Principal Applicant's story is their story.

Core Claim

[32] The Applicants submit that the RAD erred in failing to assess all of the grounds of the claim before it. Specifically, that the Principal Applicant advocated for the property rights of her mother, a widow. They refer to a National Documentation Package [NDP] document which states that "confined widows" are subject to social restrictions for up to a year, may be viewed as "inherited" as part of her husband's property and, in traditional southern communities, may fall under suspicion when their husbands die. The Applicants assert that the RAD erred in failing to assess this ground of their claim – supporting the fundamental human right of a widow – even if it was not raised by the Applicants.

[33] There is no merit to this submission. The Applicants' submission to the RPD and to the RAD made no mention of the Principal Applicant facing persecution as a widow's advocate. I note that when appealing to the RAD, applicants must identify the errors that are the grounds of appeal (*Refugee Appeal Division Rules* SOR/2012-257, s 3(3)(g)(i)). The Applicants' submission to the RAD did not indicate that the RPD erred in failing to address an allegation of persecution

based on the Principal Applicant's widow advocacy. And, as the Respondent points out, nor does the transcript of the Principal Applicant's testimony before the RPD include any evidence that the Principal Applicant was acting or faced persecution as a widow's advocate. This new argument arises for the first time on judicial review. Accordingly, the Court should not consider the argument, nor can the RAD be faulted for not addressing an argument that was not before it (*Sigma Risk Management Inc v Canada (Attorney General)*, 2022 FCA 88 at para 6, citing *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at para 23; *Zabihiseasan v. Canada (Attorney General)*, 2023 FC 1119 at paras 54-55; *Wang v. Canada (Citizenship and Immigration)*, 2023 FC 866 at paras 21-23).

[34] Further, as the Respondent submits, the record contains nothing to support that the Principal Applicant was persecuted *because of her advocacy* of her widowed mother. Her claim was that she was persecuted by her half sisters because they sought to have their father's house sold so that they could obtain part of the sale proceeds. And, even if the Principal Applicant's mother were also targeted by the half sisters, the evidence indicates that this was because of the half sisters' desire to obtain the property. There is no evidence that the Principal Applicant's mother was targeted because she was a widow or that the Principal Applicant was targeted because she advocated for her mother as a widow.

[35] Similarly, there is no merit to the Applicants' assertion that the RAD failed to assess their "core claim". According to the Applicants, they "clearly stated in their narrative" that they are being threatened by the half sisters "because the Principal Applicant refused to transfer the property bequeathed to her, her late mother, and her siblings". This engages the "fundamental

human rights of the Principal Applicant, her siblings and late mother”. They submit that the RPD and RAD erred by focusing on credibility concerns and nexus rather than considering “the possibility of the Applicants being persecuted based on the refusal of the Principal Applicant to allow the inherited property from being taken over by her half sisters and support for her widowed mother.”

[36] I confess that I have some difficulty in following this line of reasoning. However, and in any event, the RAD clearly recognized the Principal Applicant’s core (and only) claim, being persecution of her and her immediate family by the half sisters who sought to force the sale of her late father’s home. I note that she stated repeatedly in her testimony before the RPD that her only fear was that of her half sisters.

[37] Similarly, there is also no merit to the argument that counsel for the Applicants’ made when appearing before me that the RAD erred in failing to consider her assertion that she has been the subject of “spiritual attacks” (or “juju”), which she attributed to her half sisters. Counsel asserted that this was a material element of the Principal Applicant’s claim and encompasses cultural and religious considerations all of which the RAD failed to address. However, the RAD considered the Principal Applicant’s claim that she and her family’s lives were at risk from the agent of persecution, the half sisters, but found the claim not to be credible. No error arises by not the mentioning the alleged means of harm – spiritual attacks – or the cultural or religious basis for holding a belief that harm could be incurred in this manner.

Nexus

[38] The Applicant submits that the RAD concluded that the motivation of the agents of persecution was of a criminal nature and, therefore, did not fall under s 96 of the *IRPA*. The Applicants submit that the RAD misunderstood the nature of the claim and the risks faced by the Applicants. It erred in failing to recognize the Principal Applicant's membership in a particular social group: "supporter of a widow, custodian of family tradition of inheritance and the right to own property". Further, that the RAD failed to consider this ground of her claim through the lens of culture and gender as a woman advocating for the fundamental human rights of another woman.

[39] However, the argument before the RAD was that a nexus lies in the Principal Applicant's membership in a particular social group: family. The RAD discussed what comprises a particular social group and found being a member of a particular social group is alone not sufficient, there must be something about the group which is related to discrimination and human rights. The Principal Applicant was a member of her family but not all of the members of her family were being discriminated against or persecuted by the half sisters *because of* their membership in the family. Rather, the Principal Applicant's claim that she was being harassed by the half sisters in an effort to pressure her into relinquishing an allegedly inherited house. This did not involve discrimination or infringement of the Applicants' human rights. Rather, the Principal Applicant was allegedly enmeshed in what was essentially a property dispute with other members of her family. The RAD found that there was no nexus to a Convention ground.

[40] As discussed above, the Applicants' BOC does not raise her current claims of being a widow's advocate or the engagement of fundamental rights, nor did her testimony before the RPD. I do not agree that the RAD mischaracterized the Principal Applicant's claim nor that it erred in finding that the Applicants had not established a Convention nexus under s 96 of the *IRPA*. In my view, as the RAD found, the Applicant's claim boils down to a property dispute with her siblings.

Section 97

[41] The Applicants also submit that although the RAD determined that the claim had no nexus to a Convention ground under s 96, it also failed to conduct a proper analysis under s 97 of the *IRPA*. They submit that the Principal Applicant testified that the Applicants feared for their lives, thus engaging s 97. Further, the NDP also contains (unspecified) documentation that speaks to discrimination against and abuse of women based on inheritance as well as (unspecified) documents about the abuse of children, which the RAD failed to consider.

[42] In my view, this is merely a restatement of the Applicants' arguments that the RAD mischaracterized their claim, which I have rejected for the reasons set out above.

[43] Further, the RAD's credibility findings were reasonable, and it did not err by applying the same analysis to both section 96 and subsection 97(1) of the *IRPA*.

Conclusion

[44] For the reasons above, I find that the RAD's credibility findings were reasonable and that it did not otherwise err in its analysis of the Applicants' claim.

JUDGMENT IN IMM-8614-22

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;
2. There shall be no order as to costs; and
3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-8614-22

STYLE OF CAUSE: MARIA OLASUNKANMI KUKOYI, ISRAEL
OLAOLUWA KUKOYI, JEREMIAH OLAKUNLE
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IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

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