Federal Court  Cour fédérale

Date: 20130410

Docket: IMM-7160-12

Citation: 2013 FC 361

Toronto, Ontario, April 10, 2013

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

NKEM IKECHI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Applicant seeks judicial review of a Pre-Removal Risk Assessment [PRRA] decision, wherein it was determined that she would not be subject to risk of torture, risk of persecution, danger of torture, risk to life or risk of cruel and unusual treatment or punishment in Nigeria. The Applicant alleges that she is at risk as a widow (a particular social group at risk in Nigeria) whose late husband's family threatens to kill her as a Christian. In particular, she challenges the PRRA Officer's internal flight alternative [IFA] finding.

II. Judicial Procedure

[2] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] for judicial review of the PRRA Officer's decision, dated April 26, 2012.

III. Background

[3] The Applicant, Ms. Nkem Ikechi, is a Nigerian citizen and Christian Igbo who was born in 1974.

[4] On July 31, 2008, the Applicant's husband passed away. His family accused her of killing him; they threatened to kill her and, as per customary ritual, forced her to sleep with his corpse and dance in public dressed in only a wrapper and palm leaves and covered in charcoal to signify evil (evidence of such is specified at p 246 of the Certified Tribunal Record [CTR] in respect of customary ritualistic practices in relation to widowhood in Nigeria as per the World Health Organization 1948).

[5] After the burial, an elderly woman warned the Applicant that her late husband's family would force her to drink poisoned water with which his corpse was washed. She fled but her sister-in-law found her in Lagos and threatened to kill her. Informed of the situation, the police stated that such matters should be settled by the family.

[6] On September 14, 2008, the Applicant arrived with an agent in Calgary, Alberta.

[7] On September 24, 2010, the Refugee Protection Division [RPD] of the Immigration and Refugee Protection Board refused the Applicant's claim for refugee protection, reasoning that she had an IFA in Abuja and Benin.

[8] Since the RPD decision, the Applicant's family home was destroyed in a fire and her sister was kidnapped for two weeks and released after payment of a ransom; the Applicant suspects that her late husband's family was responsible for both incidents.

[9] Country condition evidence post-dating the RPD decision illustrates that Christians have been increasingly and violently persecuted in parts of Nigeria.

[10] The Applicant presented the following evidence to support her PRRA application: (i) statements in her PRRA application; (ii) submissions by counsel, dated February 15, 2012 and June 14, 2011; (iii) an email from Odo Abukipe, dated February 7, 2012 [Abukipe email]; (iv) an email from Chioma Ogbonna, dated February 6, 2012 [Ogbonna Letter]; (v) four colour photographs; (vi) a letter from Ernest Uwakwe [Uwakwe Letter]; (vii) a letter from Choima Ogbonna [Ogbonna Letter]; (viii) a psychiatric assessment, dated February 16, 2010; and (ix) country condition evidence on terrorist attacks on Christians and the situation of widows in Nigeria.

IV. Decision under Review

[11] In the Officer's view, there was no more than a mere possibility that the Applicant would face persecution in Nigeria. Nor were there substantial grounds to believe she would face torture or

were there reasonable grounds to believe the Applicant would face a risk to life, or of cruel and unusual treatment or punishment. In particular, the Applicant did not provide sufficient evidence to rebut the RPD's conclusion that she had IFAs in Abuja and Benin.

[12] Under paragraph 113(*a*) of the *IRPA*, the PRRA Officer did not address certain country condition evidence on anti-Christian violence and ill-treatment of widows in Nigeria because it pre-dated the RPD decision and the Applicant did not explain why it was not reasonably available to her or why she could not reasonably be expected to have presented it to the RPD. Nor did the PRRA Officer consider material a report on Benin or another United Nations High Commissioner for Refugees report. The psychiatric assessment received little weight since it did not include a referral for treatment.

[13] The PRRA Officer did not accept that the Applicant was a person in need of protection under section 97 of the *IRPA* because she suffers from post-traumatic stress disorder and chronic ongoing knee pain. The PRRA Officer reasoned that she did not present sufficient evidence to show that the Applicant would be denied psychiatric or medical treatment in Nigeria.

[14] The PRRA Officer was neither convinced of the Applicant's younger sister's kidnapping nor the burning of the family home. The PRRA Officer accepted accounts of the kidnapping in the Ogbonna and Uwakwe Letters. Since, however, the kidnapping occurred on a road between Umuahia city and Orie Akpu market, the Letters did not rebut the finding that the Applicant has IFAs in Abuja or Benin. The PRRA Officer accepted that the photographs showed her family's fire-damaged and razed residence but found they did not establish what caused the fire and, without

corroborating evidence, attributions of arson to her in-laws in the Ogbonna email were speculative. The photographs also did not rebut the IFA finding since the evidence suggested that the home was in Imo.

[15] The Officer also reasoned that, though her sister recalled details that police could use to identify her captors, the Applicant's family did not seek state protection. Citing *Kadenko v Canada (Minister of Citizenship and Immigration)* (1996), 124 FTR 160, 143 DLR (4th) 532 (FCA), the PRRA Officer stated that claimants must show they exhausted available state protection measures; a burden directly proportional to the level of democracy of the state at issue.

[16] Nor did the PRRA Officer find that the Applicant had no IFA in Nigeria as a Christian. The Abuikpe email (detailing problems in Sokoto and Kano and anti-Christian violence in northern Nigeria) did not establish that the Applicant would be at risk in Abuja and Benin. Accepting that religious and ethnic conflict in Nigeria exists, the Officer nonetheless also found that country condition evidence did not establish risk in Abuja or Benin. A 2010 United States Department of State report did not establish that religious violence in the Middle Belt extended to the capital of Abuja; evidence of a bombing of a United Nations building in Abuja by extremist Muslims was not probative of her personal situation because she had not established that she was involved in similar activities that would attract extremist violence.

[17] The PRRA Officer also reviewed recent general country condition evidence, concluding that there had been no significant change since the RPD decision that could otherwise personally put the Applicant at risk under section 96 or subsection 97(1) of the *IRPA*.

V. Issues

[18] (1) Was the decision unreasonable because the PRRA Officer's reasoning was based on the RPD's IFA findings?

(2) Was the PRRA Officer's IFA finding reasonable?

(3) Was a hearing required under paragraph 113(*b*) of the *IRPA* and section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*]?

VI. Relevant Legislative Provisions

[19] The following legislative provisions of the *IRPA* are relevant:

Convention refugee	**Définition de « réfugié »**
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	*b*) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
Person in need of protection	**Personne à protéger**

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de

country to provide adequate health or medical care.

l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Person in need of protection

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

Personne à protéger

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

…

[...]

Consideration of application

113. Consideration of an application for protection shall be as follows:

Examen de la demande

113. Il est disposé de la demande comme il suit :

(*a*) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;

a) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;

(*b*) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;

b) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;

(*c*) in the case of an applicant not described in

c) s'agissant du demandeur non visé au paragraphe

subsection 112(3), consideration shall be on the basis of sections 96 to 98;	112(3), sur la base des articles 96 à 98;
…	[...]

VII. Position of the Parties

[20] The Applicant submits that the PRRA Officer unreasonably required her to rebut the RPD's IFA finding. The Applicant claims that reasoning on the basis of RPD decisions is inconsistent with limits on evidence under paragraph 113(*a*) of the *IRPA*. Citing *Yousef v Canada (Minister of Citizenship and Immigration)*, 2006 FC 864, 396 FTR 182 and *Kaybaki v Canada (Solicitor General)*, 2004 FC 32, the Applicant claims the PRRA Officer could examine only evidence arising after the RPD rejected her claim or that was not reasonably available for her to present to the RPD.

[21] In the Applicant's view, the assessment of the new evidence was unreasonable. The Applicant claims that the country condition evidence demonstrates that she was at risk of anti-Christian extremist violence in Nigeria. Evidence of her sister's kidnapping and her family's home's destruction the Abukipe email was relevant (even though neither incident occurred in Benin or Abuja) because it shows that her in-laws continue to pursue her.

[22] The Applicant further argues that the PRRA Officer's characterization of her sister's attribution of her kidnapping and the burning of the family home to her in-laws as speculative is a negative credibility finding. The Applicant argues that she should have had an opportunity to respond to the PRRA Officer's credibility concerns.

[23] Finally, the Applicant takes the position that the PRRA Officer was unreasonable to find that she continued to have an IFA in Abuja and Benin. Country condition evidence, the Applicant argues, shows many Christians, including non-government employees, are at risk of persecution by Muslim extremists throughout Northern Nigeria.

[24] The Respondent counters that the PRRA Officer reasonably concluded that there was insufficient evidence that the Applicant did not have an IFA. Country condition evidence and correspondence did not establish that the Applicant would be personally targeted by Muslim extremists or participated in activities that would attract Muslim extremist violence.

[25] Nor, according to the Respondent, was the Applicant entitled to an oral hearing under paragraph 113(*b*) of the *IRPA* and section 167 of the *Regulations*. Since the Applicant's credibility was not at issue, the section 167 factors did not require a hearing.

VIII. Analysis

Standard of Review

[26] Unless a question of procedural fairness arises, the standard of review for a PRRA officer's decision is reasonableness (*Shaikh v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1318 at para 16). Whether paragraph 113(*b*) of the *IRPA* requires an oral hearing is also reviewable on a standard of reasonableness (*Mosavat v Canada (Minister of Citizenship and Immigration)*, 2011 FC 647. Some decisions of this Court have held that the applicable standard of review is correctness because paragraph 113(*b*) involves a question of procedural fairness (*Sen v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1435). The approach in *Mosavat*, however, is

to be preferred because a PRRA officer decides whether to hold an oral hearing by considering a PRRA application against the requirements in paragraph 113(*b*) and the factors in section 167 of the *Regulations*. Thus, applying paragraph 113(*b*) is essentially a question of mixed fact and law attracting deference.

[27] If the standard of reasonableness applies, courts may only intervene if the reasons are not "justified, transparent or intelligible". To meet the standard, a decision must fall in the "range of possible, acceptable outcomes ... defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

(1) Was the decision unreasonable because the PRRA Officer's reasoning was based on the RPD's IFA findings?

[28] The argument that the decision is unreasonable for being based on the RPD's IFA finding cannot succeed. *Silva v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1294 explains that an IFA finding by the RPD precludes a positive PRRA finding unless new evidence shows "that a material change in circumstances has occurred since the prior determination by the RPD" (at para 20).

[29] The PRRA Officer could reasonably require the Applicant to rebut the RPD's IFA findings. Submissions to the contrary are inconsistent with the aim of paragraph 113(*a*) to avoid the "risk of wasteful and potentially abusive relitigation" that could result when a PRRA "require[s] consideration of some or all of the same factual and legal issues as a claim for refugee protection" (*Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385 at para 12). As held in *Raza*, limits on evidence that may be presented in a PRRA under paragraph 113(*a*) are "based on

the premise that a negative refugee determination by the RPD must be respected by the PRRA officer, unless there is new evidence of facts that might have affected the outcome of the RPD hearing if the evidence had been presented to the RPD" (at para 13).

[30] The PRRA Officer was required to respect the RPD's IFA finding unless there was new evidence showing a material change in circumstances since the RPD decision.

(2) Was the PRRA Officer's IFA finding reasonable?

[31] The PRRA Officer's finding that the Applicant did not rebut the RPD's IFA finding is unreasonable. The Applicant did present new evidence showing a material change in the circumstances undermining the RPD's decision that she had an IFA.

[32] *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (CA) sets out the test for deciding if an IFA is available. Decision-makers must be satisfied, on a balance of probabilities, that: (i) there is no serious possibility of an applicant being persecuted in a proposed IFA; and (ii) in all the circumstances, including those particular to the applicant, conditions in the proposed IFA are such that it would not be unreasonable for the applicant to seek refuge there (at para 13).

[33] In essence, the PRRA Officer found that the new evidence did not rebut the RPD's finding that the Applicant had viable IFAs in Abuja and Benin. The PRRA Officer came to this conclusion for the following reasons: (i) her sister's kidnapping did not occur in Benin or Abuja but on a road between Umuahia and Orie Akpu; (ii) the burning of the family home was not connected with

Benin or Abuja; (iii) photographs of the burned home did not establish that her in-laws were responsible for arson; (iv) the attribution of the fire to her in-laws was speculative; (v) her family failed to seek state protection for the kidnapping and presumed arson of her home; and (vi) country condition evidence did not show Christians were generally at risk in Abuja and Benin.

[34] It was not reasonable for the PRRA Officer to conclude that the kidnapping did not rebut the RPD's IFA finding because it did not occur in Benin or Abuja. Since it suggests that her in-laws have the ability and inclination to locate her in other parts of Nigeria, the kidnapping could show that there is a serious possibility that the Applicant would be at risk in the proposed IFAs. If one accepts that the incident shows that her in-laws can and will locate her in other parts of Nigeria, the PRRA Officer's position that the kidnapping did not rebut the IFA finding because it did not occur in Abuja or Benin falls outside the range of possible, acceptable outcomes.

[35] Further analysis of the kidnapping was required in order to justify a finding that it did not rebut the IFA finding. It might, for example, be reasonable to infer from the location of the kidnapping (on a road between Umuahia and Orie Akpu) that Abuja and Benin remain viable IFAs. If it occurred somewhere far from those cities or in a place her in-laws associate with her, it may be reasonable to find that there is no serious possibility of risk in Benin or Abuja. The record does not contain information that would allow the Court to look to the record to support the PRRA Officer's finding in this regard (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at para 15).

[36] The finding that "no members of [her] family ha[ve] reported the kidnapping to the police, and that the applicant has never approached the police in Nigeria, in regards of any crimes which have been committed against her" is unreasonable for two reasons (CTR at p 6). First, this is an erroneous finding of fact made without regard to the material before the PRRA Officer. Indeed, the Applicant stated in her PRRA Application that she "could no[t] access police protection in Nigeria even though [she] made a complaint" (CTR at p 223). Nor could the PRRA Officer reasonably infer that the Applicant herself had state protection against her in-laws from the failure of her family to seek state protection. The relevant question was whether the Applicant had state protection. In this case, the record shows that the Applicant complained to the police but was informed that her problem with her in-laws "was a family matter" best settled with her in-laws (CTR at p 290). Under *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, state protection is not available if the state is unable or unwilling to protect a claimant (at para 59).

[37] Given this Court's analysis of the kidnapping, it is not necessary to consider if the IFA finding is reasonable in light of the other evidence the Applicant presented on the burning of her family home and anti-Christian violence in Nigeria. This Court adds, however, that the PRRA Officer's conclusion that general anti-Christian violence has not spread to Abuja may be inconsistent with country condition evidence on the record of a Christmas Day bombing of a Catholic church near Abuja (CTR at p 168).

(3) Was a hearing required under paragraph 113(*b*) of the *IRPA* and section 167 of the *Regulations*?

[38] Given the above analysis of the kidnapping, it is not necessary to consider whether a hearing was required under paragraph 113(*b*) of the *IRPA* and section 167 of the *Regulations*.

IX. Conclusion

[39] For all of the above reasons, the Applicant's application for judicial review is granted.

JUDGMENT

THIS COURT ORDERS that Applicant's application for judicial review be granted and the matter be returned for determination anew (*de novo*) before another Immigration Officer. No question of general importance for certification.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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