

CANADA / JUDGMENT

MB9-26727

COURT

Refugee Appeal Division

DECIDED

21 January 2020

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RAD File / Dossier de la SAR : MB9-26727

MB9-26728 / MB9-26729 / MB9-26730

Private Proceeding / Huis clos

Reasons and decision ? Motifs et décision

Persons who are the subject of the appeal

XXXX XXXX XXXX XXXXXXXXXXX XXXX XXXX XXXXXXXXXXX XXXX XXXX XXXX XXXXXXXXXXX XXXX
XXXX XXXX

Personnes en cause

Appeal considered at

Montreal, QC

Appel instruit à

Date of decision

January 21, 2020

Date de la décision

Panel

Me Michel Colin

Tribunal

Counsel for the persons who are the subject of the appeal

Me Melissa Singer

Conseil des personnes en cause

Designated representative

XXXX XXXX XXXX

Représentant(e) désigné(e)

Counsel for the Minister

N/A

Conseil du ministre

REASONS FOR DECISION

OVERVIEW

- [1] XXXX XXXX XXXX (Principal Appellant) and XXXX XXXX XXXX, XXXX XXXX XXXX XXXX, XXXX XXXX XXXX XXXX (Associate Appellants), citizens of Nigeria, appealed a decision of the Refugee Protection Division (RPD), dated October 21, 2019, rejecting their claims for refugee protection.
- [2] The Appellants alleged in the Basis of Claim (BOC) forms, that they fear people who kidnapped the Principal Appellant because he refused to compromise the CCTVs that he installed for the government. In subsequent amendments to his BOC form, he stated that he fears his client, XXXX XXXX, who assaulted and threatened to kill him when he demanded payment for services rendered, and at the hearing indicated that he fears the same individual because he was a witness to the fact that he held people hostage.
- [3] The RPD rejected the asylum claim as it found the Appellants to not be credible.
- [4] Before the Refugee Appeals Division (RAD), the Appellants submit that the RPD erred as it breached procedural fairness and failed to properly examine the evidence, both testimonial and documentary.
- [5] I find no breach in procedural fairness and I find that the RPD decision is correct. The RAD therefore dismisses the appeal and confirms the decision of the RPD that the Appellants are neither Convention refugees nor persons in need of protection. The reasons are as follows.

ANALYSIS

- [6] The determinative issues are procedural fairness and credibility.

No breach of procedural fairness or any other errors in passages that were submitted as having some

- [7] In a number of paragraphs of their memorandum, the Appellants refer to breaches in procedural fairness or similarly, that they were deprived of a fair and impartial hearing. As such questions may be determinative, I will address them first.
- [8] The Appellants did not identify any part of the hearing where procedural fairness was allegedly compromised. I have nevertheless listened to the full recording of the hearing, and I found no breach of procedural fairness. Quite the contrary, I found that the Appellants

were given the opportunity to fully present their case. Furthermore, there were no concerns raised by counsel during the hearing. Indeed, there were no objections or motions that were denied pertaining to change of date and time, change of interpreter, accommodations required, permission to submit documents after the hearing that the Member recuse herself or any other matter.

- [9] The Appellants nevertheless submit that there was a breach of procedural fairness apparent in certain statements and findings found in the RPD decision.
- [10] In this section, I will for the most part address the submissions allegedly pertaining to procedural fairness in the order that they appear in the memorandum. As I believe that the Appellants may simply have misqualified some of their concerns as procedural fairness issues, I will also examine whether each passage contains other types of errors before going on to the next submission allegedly pertaining to procedural fairness. I will examine all the remaining submissions in the next two sections.
- [11] The Appellants submit that, "By its own admission, The Tribunal rendered a perverse decision given its overriding preoccupation with credibility. This is coupled with paragraphs 34 and 37 where the Tribunal repeatedly pronounced, 'but there is more' thus depriving the Appellants of a fair and impartial hearing".
- [12] I find no error in the fact that the RPD focused on credibility as it is the cornerstone of the granting of protection pursuant to both sections 96 and 97(1) of the Immigration and Refugee Protection Act (IRPA). The words "but there is more" that appear twice in the decision were used to indicate a multiplicity of entirely new allegations that were omitted in previous narratives. They allow the reader to understand that what follows is still related to the previous text, which may not have been so obvious otherwise, as a whole new set of allegations is addressed. I find that the use of these terms does not constitute an error, nor does it create an apprehension of bias or any other procedural fairness concern in such circumstances.
- [13] The Appellants submit that, "Under the ambit of multiple omissions regarding the Principal agent of harm XXXX XXXX, there is a breach of procedural fairness vis-à-vis the Appellants based on the silence of the initial BOC concerning XXXX XXXX. The Appellants were not afforded the benefit of the doubt...". I will address this along with the similar submission that, "The Tribunal's incoherent and faulty reasoning is further reiterated in its reasoning at paragraphs 44, 45, and 48 relative to the BOC and first revised narrative."
- [14] I find that the negative inferences regarding credibility based on multiple omissions in the successive narrative are correct, as they all pertain to facts that are either extremely relevant or central to the asylum claim. The benefit of the doubt should only be granted for flawed evidence when the Appellants are generally credible,¹ which is not the case. The Appellants were provided with an opportunity to provide explanations for their omissions at the hearing, that the RPD evaluated their explanations, and I agree with the RPD's analysis. I find no error or breach of procedural fairness in this regard.

- [15] The Appellants submit that, "At paragraph 36 of the decision, the Tribunal's findings are adversarial, insensitive, exaggerated and deviate from the role of a fair and impartial hearing. The decision reflects a perverse inquisition at paragraphs 31 through 37. Evidence of a lack of candor does not necessarily negate the Appellants' need for protection. Even where a statement is material and not believed, a person may be a refugee. The Tribunal must examine all of the evidence and arrive at a conclusion on the entire case."
- [16] Paragraph 36 simply states the fact that new omissions kept on being revealed as the hearing went on and then proceeds to give examples of this, all of which are factually true and relevant. I see no error in this paragraph.
- [17] I fail to find any sign of inquisition, let alone a "perverse" one, in paragraphs 31 through 37. The paragraphs in question simply enumerate a succession of relevant omissions and explain why they are relevant, all of which I find to be correct.
- [18] While I agree that evidence of a lack of candour does not always negate one's need for protection, I find that the RPD was correct when finding that substantial changes in the narratives, including the identity of the agent of harm, the reasons for which the agent of harm targeted the Appellants, the time and order in which events occurred, requires explanations as to why these facts were omitted in several previous versions of the facts submitted to the Board. As the RPD correctly found the explanations provided to be inadequate and since there are no other reasons alleged to consider regarding the asylum claim, this "lack of candor", or these important omissions, seriously compromised the credibility of the Appellants. Furthermore, the RPD decision is also correctly based on other credibility issues described in other paragraphs than these as well.
- [19] The Appellants fail to mention which evidence the RPD failed to consider, and after a full examination of the record I do not find this to be the case. As such, they have failed to rebut the presumption that the RPD considered all of the evidence.
- [20] The Appellants submit that, "The decision is repetitive and replete with erroneous findings. At paragraphs 28, 41, 42, and 47 the Tribunal keeps alluding to the support workers at the YMCA." I will address this along with the similar submission that, "Based on the aggregate of the foregoing and after a careful examination of paragraphs 25 through 60, the findings repetitive and lacking in coherence, thus precluding a full and impartial hearing."
- [21] I find no error or breach of procedural fairness. The presentation of the facts represents some challenge as there are three narratives each containing substantially new allegations. The RPD clearly structured its decision to ensure transparent and intelligible analysis and reasons. The few instances of repetition are largely due to repeated identical responses given by the Principal Appellant at the hearing that omissions and contradictions were all attributable to support workers at the YMCA, for a number of different issues, all of which needed to be addressed in the decision.

- [22] The Appellants submit that, "Moreover, the Tribunal held that the new information provided at the hearing should have been included in his written declaration, which highlights a lack of procedural fairness. At no time were the Appellants examined in light of section 97 (l) of the IRPA"
- [23] I have already explained that I find no error in the RPD findings that the omission of relevant or central facts from the multiple BOC narratives diminished the credibility of the Appellants. If they believe that they were not properly examined at the hearing with regard to section 97(1), I note that they had the opportunity to be questioned by their counsel at that hearing. The RPD has no obligation to question them on any particular matter as the Appellants are those who have the burden of proof. The failure to conduct a 97(1) analysis in its decision does not constitute an error either as the RPD correctly found that the evidence was not credible. I find neither error nor breach of procedural fairness.
- [24] In conclusion, I find no breach of procedural fairness whatsoever.

The submissions pertaining to other errors in the RPD decision are not founded

- [25] The Appellants submit that the RPD's failure to properly evaluate credibility was "myopic" in its decision and that it "based its findings on a microscopic treatment of the evidence.... scrutinized through a Canadian lens."
- [26] While the first of these submissions is clearly an introductory remark for which specific examples are later referred to, it is not clear whether the two others should be considered as such. Indeed, there are no allegations later in the memorandum that refer to "myopic", "microscopic" or "evidence scrutinized through a Canadian lens". In the absence of specific references and since I find no such errors myself, I find that the RPD decision is correct.
- [27] The Appellants submit that, "At paragraphs 43, 44 and 52, the Tribunal found that the documentary evidence provided was deficient because it did not reference the allegations yet used the documentation to impugn the Principal Appellant's credibility."
- [28] I should first mention that only part of paragraph 43 refers to documentary evidence, and it does so by indicating the absence of any on the subject described in the previous paragraph. There are no references to documentary evidence in paragraphs 44 and 52 of the decision at all. It is clear that the RPD did not use inexistent documentary evidence to impugn the Principal Appellant's credibility in subsequent paragraphs. The references that are made in all three paragraphs pertain to the various BOC narratives. The RPD correctly found that omission of a number of the most central elements of the claim in the narratives impugn the Principal Appellant's credibility.
- [29] The Appellants submit that, "Under the ambit of inconsistencies regarding threatening telephone calls, the Appellant was never advised with respect to his testimony about the calls as set out in paragraph 50 of the decision."

- [30] The RPD refers to these inconsistencies in paragraphs 49 to 56 of its decision. In paragraph 55, it clearly indicates that it gave the Principal Appellant the opportunity to explain the inconsistencies and noted his answer prior to explaining clearly and correctly why it was not satisfactory.
- [31] The Appellants submit that, "At paragraphs 53 through 59 of the decision, the Principal Appellant's credibility was again impugned for reversing the order of the threats....the Court warned against turning the refugee claim into a memory test."
- [32] I find no error in the conclusion of the RPD that his testimony was further diminished, not only by the order of the threats, but also the adjustment in testimony when he was offered to explain the contradiction that resulted from this. The Federal Court in the Ogaulu2 case described the distinction to be made between the proper assessment of evidence and a "memory test". It found no error in drawing a negative inference because of the Applicant's failure to recall significant details of the events accurately and consistently when the questions are material and directed to the core of the claim. As the threats and other facts described in paragraphs 53 through 59 are central to the claim, I find that the RPD decision is correct in this regard.
- [33] In light of the numerous credibility issues concerning the very heart of the asylum claim that were not adequately explained, I find that the conclusion that the Appellants are not credible to be correct.

The documentary evidence was correctly considered by the RPD

- [34] The Appellants submit that, "At paragraph 61 of the decision, the Tribunal made inconsistent findings with regard to the demand letter as well as the lawyer's letter. The Tribunal accepts the documents as corroborating the Appellant's allegation of an outstanding debt of XXXX XXXX yet ascribes no probative value with respect to risk of harm."
- [35] I find that the RPD decision is correct. The letters³ simply corroborate the existence of a debt and provide no corroboration of any threat or risk of harm. I do not find that the RPD made inconsistent findings when stating that the document corroborates the existence of financial debt but does not establish on a balance of probabilities that the debtor intends to harm the creditor.
- [36] The Appellants submit that, "With regard to the newspaper article set out in paragraph 62 and following, the findings are convoluted. At paragraph 66, the Panel dismissed the article as brown envelope journalism without a proper explanation or notice. The Tribunal never raised the authenticity of the document. Clearly the Tribunal mixes the weight of the documents and credibility findings which is a faulty finding."

- [37] I note that the RPD correctly gave no weight to this article because of a combination of several reasons. It first noted the incongruity resulting from the fact that the Principal Appellant's family reported facts to the newspaper prior to publication though they also stated that they only found out these facts after reading the published article. Secondly, though the Principal Appellant failed to explain the incongruity, he adjusted his testimony when trying to do so. Finally, the RPD noted that the objective documentary evidence indicates an abundance of brown envelope journalism. It was not necessary for the RPD to raise the authenticity of the document as brown paper journalism by its very nature uses authentic publications to report unverified information by those who pay. Evidence of widespread availability of fraudulent documents in a country is not, by itself, sufficient to reject documents from that country. However, it may be a relevant factor, if there are other reasons to question the authenticity of a document or the claimant's credibility as clearly, sufficiently and correctly demonstrated in the RPD decision.
- [38] The Appellants submit, "Again at paragraphs 70 and 74 of the decision, the Tribunal has confused credibility concerns with the probative value of a document which is faulty. Similarly, the Tribunal erred when it canvassed the Appellant to explain a contradiction in a report drafted by a third party. At paragraph 73 of the decision, the Tribunal has demonstrated unwarranted expectations of the Appellant when it states... 'the Panel would expect' that a medical report from a third party not omit his admission within the regular board. Clearly, the Appellant cannot legislate for a third party."
- [39] I note that there are two documents examined by RPD in these paragraphs. The first emanates from a Canadian medical practitioner who examined the Principal Appellant and states that his vision and hearing loss could plausibly have resulted from the violence allegedly suffered by him. There is no reason to doubt the authenticity of the document. However, as correctly found by the RPD, the letter does not rule out other possible reasons for hearing and vision loss. Since the RPD found the Principal Appellant not to be credible, it correctly found that this evidence is insufficient, on a balance of probabilities, to establish that a kidnapping occurred. The RPD decision is correct.
- [40] The second document is a letter is dated XXXX XXXX, 2019, and reports the hospitalization of the Principal Appellant as of XXXX XXXX, 2017, and discharged XXXX XXXX, 2017, which amounts to a total of seven days. The RPD correctly found an inherent inconsistency in the letter as it refers to a five-day hospitalization. When asked to explain the inconsistency, the Principal Appellant testified that he was hospitalized for five days in the intensive care unit and three days in the regular ward. The RPD correctly found this answer to be unsatisfactory, as it does not address the inconsistency but rather adds a new one, since it gives rise to a third duration of hospitalization of eight days, which corresponds to neither of the two durations found in the letter.

- [41] While it is true that the letter was drafted by a third party, that is not the explanation given by the Principal Appellant. Quite the contrary, he engaged in an explanation that gave rise to further contradictions. The RPD correctly considered the explanations provided.
- [42] As correctly stated by the RPD in different terms, not only do the three duration periods raise credibility concerns, the probative value of the document itself is diminished by its inherent inconsistencies and the fact that none of the two versions found in it actually corroborate the allegation that the Principal Appellant was hospitalized for eight days.
- [43] For purposes of clarification, I note that according to the BOC form, the Principal Appellant was released from his captors on XXXX XXXX, 2017, rather than on XXXX XXXX, 2017, as indicated in the hospital's letter. However, the Principal Appellant was not given the opportunity to explain this at the hearing, so I have not drawn any negative conclusions from this contradiction.
- [44] Finally, the mention in the letter that the injuries were the result of a kidnapping was not independently verified by the medical staff. It is merely the reproduction of statements made to them by the Principal Appellant which I find to be generally not credible.
- [45] I find that the RPD correctly considered the documentary evidence.
- [46] The Principal appellant failed to establish that he faces a serious possibility of persecution or, on a balance of probabilities, a risk to his life or a risk to cruel and unusual treatment or punishment. As the asylum claims of the Associate Appellants are based on that of the Principal Appellants, they have failed to do so as well.

CONCLUSION

- [47] The RAD dismisses the appeal and confirms the decision of the RPD that the Appellants are neither Convention refugees nor persons in need of protection, pursuant to section 111(1)(a) of the IRPA.

(s) Michel Colin

Michel Colin

January 21, 2020

Date

MC/lp

1 Sahar v. Canada, 2015 FC 1400 para. 22

2 Ogaulu v. Canada, 2019 FC 547, at paras. 22-25

3 RPD record page 155, Claimant exhibit C-3 Affidavit Confirming (sic) Instruction dated XXXX XX, 2019,

and pages 175 to 177, Claimant exhibit C-8 Letter from XXXX XXX XXX dated XXXXX XX, 2016.

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RAD.25.02 (April 04, 2019)

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Immigration and Refugee

Board of Canada

Refugee Appeal Division

Commission de l'immigration

et du statut de réfugié du Canada

Section d'appel des réfugiés

RAD.25.02 (April 04, 2019)

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