Federal Court  Cour fédérale

Date: 20180712

Docket: IMM-5067-17

Citation: 2018 FC 722

Ottawa, Ontario, July 12, 2018

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

**ADEBIMPE JOYCE AKINFOLAJIMI
OLUWAKORETOMIWA AKINFOLAJIMI
(MINOR) OLUWATENIOLA TREASURE
AKINFOLAJIMI (MINOR)
OLUWATIRESAYEMI AKINFOLAJIMI
(MINOR)**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants, Adebimpe Joyce Akinfolajimi [the principal applicant] and her children Oluwakoretomiwa, Oluwateniola Treasure, and Oluwatiresayemi Akinfolajimi, bring this

application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] Ms. Akinfolajimi and her children are Nigerian citizens and the wife and children of Kolawole Bamidele Akinfolajimi [Kolawole]. Kolawole arrived in Canada from the United States without his family and claimed refugee protection. The applicants followed a number of weeks later, again from the United States. They too made a claim for protection. The claims were joined and the principal applicant was appointed as the designated representative for the minor children.

[3] In considering the joined claims the Refugee Protection Division [RPD] concluded that Kolawole had established a serious possibility of persecution in Nigeria as a bisexual male. However, the RPD found that the applicants were not Convention refugees or persons in need of protection, as they had a viable internal flight alternative [IFA] in Nigeria.

[4] The applicants ask that the Court set aside the RPD's finding on the basis that it is inconsistent with: (1) the RPD's conclusion in respect of Kolawole's claim; (2) the RPD's credibility findings; and (3) the IRPA objective of reuniting families. The applicants further submit that the IFA analysis was flawed and that the RPD acted unfairly in assessing psychological evidence.

[5] I am mindful that the effect of the RPD decision is the separation of the family. However, the IRPA objective of family unification is one of a number of objectives the IRPA seeks to

advance over a wide variety of contexts. It is not a governing factor when determining if an individual claimant is a Convention refugee or person in need of protection pursuant to sections 96 and 97. Instead the IRPA provides other mechanisms that address the objective of family unification, mechanisms that might well be available to the applicants. Although the result in this case is not one the applicants would have preferred, I am unable to identify a reviewable error that would warrant the Court's intervention. For the reasons that follow the application is denied.

II. Decision under Review

[6] The RPD concluded that: (1) Kolawole's claim was based on a fear of persecution due to his sexual identity; (2) the state was an agent of persecution; (3) state protection was not available to Kolawole; and (4) he had no IFA in Nigeria.

[7] The applicants' claims related to fears arising from their association with Kolawole and their perceived support for his sexual identity. In considering the applicants' claims the RPD found that the principal applicant's fear of Kolawole's family and community leaders was credible, but did not accept their claim that the police were searching for them.

A. *The Internal Flight Alternative*

[8] Citing *Rasaratnam v Canada (Minister of Employment & Immigration)* (1991), [1992] 1 FC 706, 140 NR 138 (CA) [*Rasaratnam*], the RPD set out the two-pronged IFA test as: (1) the panel must be satisfied on a balance of probabilities that there is no serious possibility of the applicants being persecuted in the part of the country to which it finds an IFA exists, and (2)

conditions in that part of the country must be such that it would not be unreasonable, in all the circumstances, for the applicants to seek refuge there.

[9] The panel then identified Port Harcourt and Lagos as potential IFAs and considered the two identified IFAs in light of the two-part test.

(1) No serious possibility of persecution

[10] The panel rejected the principal applicant's claim that she was being sought by the police, finding her testimony was inconsistent with her Basis of Claim form [BOC] and an affidavit from her mother-in-law. The RPD noted that although she indicated in written evidence that she was personally sought by the police, when asked directly she "responded that the police are not actually looking for her, that it is her husband, the male claimant, who they are looking for." The RPD also rejected her testimony that Kolawole's family would locate the applicants in the proposed IFAs, finding the evidence to be vague and speculative.

[11] The panel concluded that there was no serious possibility of persecution in either Port Harcourt or Lagos.

(2) Relocation not unreasonable in the circumstances

[12] Citing *Ranganathan v Canada (Minister of Citizenship & Immigration)* (2000), [2001] 2 FC 164 at para 15, 266 NR 380 (CA), the RPD noted that the threshold for finding an IFA unreasonable is very high, requiring "nothing less than the existence of conditions which would

jeopardize the life and safety of a claimant travelling or temporarily relocating to a safe area." The RPD also recognized that in light of its determination that Kolawole was a refugee, it was required to undertake this reasonableness analysis "from a perspective that sees the female claimant and minor claimants relocating to either of the proposed IFAs on their own, without the presence of the male claimant."

[13] The RPD noted the principal applicant was well-educated, that ethnicity is less of a barrier in big cities in southern Nigeria than in the north and that the principal claimant "would be able to pursue her career in banking, or another field, in either of the proposed IFAs." The RPD acknowledged that relocating would be difficult and that women without male or family support face social and economic challenges in Nigeria. But the RPD concluded from its review of the documentary evidence that it is easier for educated women to run a household, and such women are better off in the southern part of Nigeria. Finally, the RPD found that a psychotherapist's report concerning the principal applicant's trauma, anxiety and depressive symptoms did not render relocation to an IFA unreasonable as "there is no evidence before the panel to suggest that such treatment could not be carried out in Nigeria."

III. Issues

[14] The application raises the following issues:

A. Did the RPD breach the applicants' right to procedural fairness when it failed to inquire into the availability of mental health care in Nigeria?

B. Did the RPD err by rejecting the applicants' claims after acknowledging their fears were credible?

C. Was the RPD's IFA assessment unreasonable in light of the documentary evidence?

D. Did the RPD err in rendering a decision inconsistent with the IRPA objective of family reunification?

IV. Standard of Review

[15] RPD decisions involving questions of fact or mixed fact and law are to be reviewed against a standard of reasonableness: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47 and 51 [*Dunsmuir*]. Issues engaging questions of fairness are to be reviewed against a standard of correctness: *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 34-56.

[16] With one exception the issues raised in this application engage questions of fact and mixed fact and law to be reviewed against the standard of reasonableness. The applicants' assertion that the RPD committed a breach of procedural fairness will be reviewed against a standard of correctness.

V. Analysis

A. *Was there a breach of procedural fairness?*

[17] The applicants submit that the RPD erred in rejecting psychological evidence of the principal applicant's mental state on the basis that there might be treatment available in Nigeria. They submit that the RPD had a duty to ask questions regarding the availability of medical services in Nigeria and the failure to do so was a breach of the applicant's right to procedural fairness. The applicants rely on *Sivamoorthy v Canada (Minister of Citizenship & Immigration)*, 2003 FCT 408 [*Sivamoorthy*], and *Velauthar v Canada (Minister of Employment & Immigration)* (1992), 141 NR 239, [1992] FCJ No 425 (QL) (CA) [*Velauthar*] in support of their position.

[18] *Sivamoorthy* and *Velauthar* stand for the principle that where a decision-maker communicates to an applicant, expressly or by implication, that a matter is not in issue it will be a denial of natural justice to then refuse a claim on those grounds if the issue is not again raised with the applicant. This is not what has occurred here.

[19] The RPD advised the applicants that IFA was in issue as it related to their claims. In doing so the RPD did not lead the applicants' to believe that the psychotherapist report was not in issue. In addressing the evidence, the RPD did not take issue with the conclusions set out in the psychotherapist report but rather found there was an absence of evidence to suggest the treatment recommended by the report was unavailable in Nigeria. While it may be open to the applicants to take issue with the RPD's conclusion that there was no evidence to suggest treatment was unavailable in Nigeria, no question of fairness arises on these facts.

B. *Did the RPD err by rejecting the applicants' claims after acknowledging their fears were credible?*

[20] The applicants submit that the RPD's conclusion that they do not face a serious possibility of persecution, nor would they be subject to torture, risk to life, or cruel and unusual punishment or treatment, contradicts the finding that the principal applicant's "testimony was generally consistent with the BOC narrative" and "that the female claimant and minor claimants are being sought for traditional cleansing."

[21] I am not convinced that the RPD's findings are contradictory. The determinative question was not whether the applicants were at risk; the RPD accepted that they were. The determinative issue was that of IFA. The IFA determination was in turn dependent upon the RPD's identification of the agents of persecution.

[22] In considering Kolawole's claim the RPD accepted that the agents of persecution included the state and found in turn that no IFA was available to him. In considering the applicants' claim the RPD identified the agents of persecution as being Kolawole's family members and his community. In assessing whether the police or the state were also agents of persecution, the RPD considered the evidence, found it to be contradictory and concluded on a balance of probabilities that the police were not pursuing the principal applicant.

[23] In concluding that the evidence was contradictory the RPD noted that Ms. Akinfolajimi acknowledged in her testimony before the RPD that the police were not actually looking for her, but rather they believed she was hiding her husband. The RPD found this evidence to contradict

her BOC statement to the effect that the police were looking for her. I am not convinced that the principal claimant's evidence before the RPD was truly contradictory; however, the testimony did clarify the nature of the police interest and provided the RPD with an evidentiary basis upon which to reasonably conclude that the police were not agents of persecution.

[24] In the circumstances the RPD's acknowledgement that the applicants' fear of Kolawole's family members and community were credible was not inconsistent with the RPD's finding that an IFA was available and that, unlike Kolawole, the applicants were not Convention refugees or persons in need of protection.

C. *Was the RPD's IFA assessment unreasonable in light of the documentary evidence?*

[25] The applicants take issue with the RPD's conclusions that the principal applicant's unusually high level of education and banking employment history, coupled with the southern cities' somewhat greater tolerance for varied ethnic backgrounds, make it reasonable for them to relocate to Lagos or Port Harcourt. The applicants further submit that they can be easily located in the proposed IFAs due to the government's growing surveillance capacity and that the panel unreasonably assessed the medical evidence before it.

[26] The RPD accurately set out the two-prong IFA test from *Rasaratnam* and undertook a consideration of both prongs of the test. Having reasonably concluded that the agents of persecution did not include the police or the other state agents the RPD considered whether family or community members had the ability to locate the applicants in either IFA. The RPD found the evidence that Kolawole's family or community members had an ability to locate the

applicants in a large urban centre was vague and speculative. This conclusion was not inconsistent with the evidence and was reasonably open to the RPD.

[27] In considering the second prong of the test the RPD addressed the applicants' particular circumstances, including education, employment history and that the family would be relocating without Kolawole. The RPD also considered the multi-ethnic nature of the proposed IFAs and the medical evidence that had been provided in the form of a psychotherapist report. The applicants submit the RPD erred in not considering evidence indicating the state has the ability to track individuals in Nigeria. While it is true that the RPD did not address this evidence, it did not need to as it had concluded the state was not an agent of persecution.

[28] The applicants' submissions in this regard amount to a disagreement with the RPD's consideration and weighing of the evidence. They cannot succeed on this basis; it is not for a court on judicial review to reweigh the evidence.

D. *Does the decision undermine the IRPA objective of family reunification?*

[29] The applicants argue that sending the applicants back to Nigeria after recognizing the refugee claim of their husband and father is contrary to the IRPA objective of reuniting families, an objective recognized in the Supreme Court's decision in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193 [*Baker*].

[30] As discussed at the outset of this Judgment, family unification is a stated objective of the IRPA and decisions within the IRPA context that lead to a different result are unquestionably

difficult. However protection claims must be assessed individually and on their own merit on the basis of the definitions set out in sections 96 and 97 of the IRPA.

[31] The applicants' reliance on *Baker* in this circumstance is misplaced. *Baker* was a case that involved an application for an exemption from the requirement to apply for permanent residence outside Canada based on humanitarian and compassionate [H&C] grounds. An H&C decision involves considerable discretion: such an application may be granted where "the Minister is of the opinion that it is justified by humanitarian and compassionate considerations."

[32] When taken as a whole the different processes provided for in the IRPA respond to the stated objectives in the IRPA, but individually those processes do not necessarily advance each of the stated IRPA objectives. *Baker* does not stand for the proposition that family reunification will dictate an outcome in all cases, but it does provide an example of a different mechanism under Canada's immigration and refugee scheme in which Parliament's stated goals and objectives can be more flexibly applied. Unlike in the H&C context – where the Minister forms an "opinion" – section 96 and 97 determinations require an officer to assess whether specific statutory criteria are satisfied.

[33] In this case the RPD was required to determine whether the applicants met the "Convention refugee" or "person in need of protection" definitions set out in sections 96 and 97. As noted by the respondent where the criteria for protection set out in sections 96 and 97 of the IRPA are not met the IRPA objectives set out at section 3 cannot independently allow for the recognition of refugee or protected person status.

VI. Conclusion

[34] There was no breach of fairness in this case. The decision is reasonable as it demonstrates justification, transparency and intelligibility within the decision-making process and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. (*Dunsmuir* at para 47). The parties have not identified a question of general importance for certification and none arises.

JUDGMENT IN IMM-5067-17

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Henry Igbinoba	FOR THE APPLICANTS
Alexis Singer	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Henry Igbinoba Barrister and Solicitor North York, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT