Federal Court  Cour fédérale

Date: 20200225

Docket: IMM-3953-19

Citation: 2020 FC 301

Ottawa, Ontario, February 25, 2020

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

WALIYAT OMOLOLA LAWAL
IN HER OWN RIGHT AND AS LITIGATION GUARDIAN TO THE MINOR,
FATHIAT AYOMIDE LAWAL

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
AND THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada, which dismissed the Applicants' appeal and confirmed a decision of the Refugee Protection Division [RPD] that the Applicants

are neither Convention refugees nor persons in need of protection pursuant to paragraph 111(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The Principal Applicant and her daughter, the Minor Applicant, are citizens of Nigeria. The Applicants arrived in Canada with the Principal Applicant's husband, the father of the Minor Applicant, in December, 2016 on visitors visas. The Principal Applicant's husband returned to Nigeria in early 2017 because he has a good job there. Since then, he has visited the Applicants in Canada numerous times.

[3] The Applicants applied for refugee protection in Canada in March, 2017. A hearing before the RPD was held in March, 2018. On that same day, the RPD determined the Applicants were neither Convention refugees nor persons in need of protection. The determinative issues at the RPD hearing were credibility and the availability of an internal flight alternative [IFA] in two cities in Nigeria where the Applicants had not previously lived.

[4] The Applicants appealed the RPD Decision to the RAD, which dismissed the appeal and confirmed the RPD Decision in Reasons for Decision dated June 11, 2019 [Decision]. The RAD held the RPD had erred by applying the "balance of probability" standard in its analysis under section 96 of the *IRPA*, but this error was not fatal to the RPD Decision. The RAD, with reasons that are ambiguous as shall be seen, said that based on the Applicants' evidence and country condition documentation, the Applicants failed to establish a "serious possibility" they will be persecuted if they return to Nigeria. It also upheld the RPD's IFA analysis.

[5] The Applicants submit a number of issues, however it is only necessary to deal with those set out below which in my view are determinative.

[6] It is common ground that the standard of review is reasonableness, which I accept. Reasonableness requires the reviewing court to pay respectful attention to the decision-maker: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, majority reasons by Chief Justice Wagner, at para 84 [*Vavilov*]. In assessing reasonableness the Court must look at the reasoning process in terms of coherent and rational chain of analysis, and the outcome of the reasoning in terms of the legal and factual constraints facing the decision-maker: *Vavilov* at paras 83-86. The decision under review must be justified, intelligible and transparent: *Vavilov* at para 99. Judicial review is not a treasure hunt for errors: *Vavilov* at para 102.

[7] The following matters have cumulatively given me cause to grant judicial review.

[8] First, it is settled law that the two-prong test to be applied in determining whether there is an IFA was established in *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706, and *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589. The test was recently outlined by Justice Pamel in *Feboke v Canada (Citizenship and Immigration)*, 2020 FC 155 at para 15:

> [15] The decisions in *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706, and *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589, have established a two-prong test to be applied in determining whether there is an IFA: (i) there must be no serious possibility of the individual being persecuted in the IFA area (on the balance of probabilities); and (ii) conditions in the proposed IFA must be such that it would not be unreasonable in all the circumstances for an individual to seek refuge there (*Reci v Canada (Citizenship and Immigration)*, 2016 FC 833 at para 19;

> *Titcombe v Canada (Citizenship and Immigration)*, 2019 FC 1346 at para 15). Both prongs must be satisfied in order to make a finding that the claimant has an IFA. This two-prong test ensures that Canada complies with international norms regarding IFAs (UNHCR Guidelines at paras 7, 24–30).

[9] As per the above, the first prong requires a finding that there is no serious possibility of the individual being persecuted in the IFA area. This test was stated by the RAD in the course of its reasons. However, the RAD explicitly applied a very different test in its assessment of IFA when it acknowledged there was "objective evidence establishing that FGM continues as a practice in Nigeria within some traditional communities" and then went on to conclude "this objective evidence does not establish that the Principal Appellant's daughter would be forced to undergo FGM by her in-laws".

[10] In my respectful view, by recasting the test in this manner, the RAD effectively required the Applicants to "establish", i.e., prove, that the female Minor applicant "would be forced to undergo FGM". This is not the test under the first prong, which requires on a balance of probabilities there is no serious possibility of the Applicant being persecuted in the IFA or subject to a risk to life or risk of cruel and unusual treatment. In this respect, the RAD's reasons were beyond a fundamental legal constraint in terms of IFA. I was asked to read this mis-statement of the law holistically and in its context, but even doing so am unable to ignore it. I find the RAD meant what it said, with the consequence that the RAD's IFA finding is unreasonable at least in this respect. It is not for a reviewing court to re-write the reasons of a decision-maker to make them conform to the applicable legal or factual constraints.

[11] Second, when looking at the second prong of the IFA test, the RAD only considered the Principal Applicant was an educated, married woman with a supportive husband who is self-

employed and earns a good income. This determination fails to respect another legal constraint in IFA determinations which calls for the assessment of all relevant circumstances, including persecution, discrimination, risk posed by family members wishing to perform FGM, and the evidence which was in the record of weak enforcement of laws designed to protect females from forced FGM and other matters: see *Feboke v Canada (Citizenship and Immigration)*, 2020 FC 155 at para 15; *Ambrose-Esede v Canada (Citizenship and Immigration)*, 2018 FC 1241 per Russell J at paras 48 to 49; *Okoloise v Canada (Citizenship and Immigration)*, 2018 FC 1008 per Zin J at paras 14-18.

[12] Third, also when looking at the second prong of the IFA test, the RAD identified two cities as IFAs. These two cities were identified twice as IFAs. At issue was whether the child would be able to get necessary health care for her medical condition in either of these two IFAs. This required the RPD to decide on the availability of treatment in each of the two IFAs. However, instead of determining the availability of treatment in each of the two IFAs, the RAD answered a different question: "I also agree with the RPD that there is no evidence that the [child] who the Principal Applicant claims has [name of medical condition deleted], would not be able to get health care for her condition <u>in Nigeria</u>" [Emphasis added]. With respect, the issue is not whether the required health care was available in Nigeria, but whether the needed health care was available in either of the two IFAs. By answering the wrong question, the RAD ran afoul of another legal constraint.

[13] Counsel for the Applicant also submitted the RAD Decision should be set aside for the same reason Justice Manson set aside the RAD's decision in *Boluwaji v Canada (Citizenship and Immigration)*, 2018 FC 1154 [*Boluwaji*]. The Applicants submit that in identifying IFAs, the

RAD ignored documentary evidence that laws designed to protect females from FGM are not or are poorly enforced. Justice Manson found in *Boluwaji* at paras 23-24 that the RAD failed to recognize and consider the distinction between the enactment of the *Violence Against Persons (Prohibition) Act* and its enforcement. In my view, this is a matter that should be addressed in the new hearing that is being ordered.

[14] In summary, I have concluded the outcome reached by the RAD is not justified in relation to the facts and the law that constrain this decision-maker. Considering the Decision holistically and not as a treasure hunt for errors, the Decision suffers from fundamental gaps in the reasoning process with respect to both prongs of the IFA test. Therefore, judicial review will be granted.

[15] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-3953-19

THIS COURT'S JUDGMENT is that judicial review is granted, the Decision is set aside, the matter is remanded for reconsideration by a differently constituted RAD, no question of general importance is certified and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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