Federal Court Cour fédérale

Date: 20201124

Dockets: IMM-6993-19

Citation: 2020 FC 1086

Montréal, Quebec, November 24, 2020

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

ADENIYI IDRIS SANUSI
ARINOLA EUNICE SANUSI
ANUOLUWAPO OLUWADARASIMI SANUSI
ADESOLA OLUWATOYOSI SANUSI

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

[1] This is a motion for reconsideration presented by the Applicants pursuant to paragraph 397(1)(b) of the *Federal Courts Rules*, SOR/98-106 [Rules], of a judgment rendered on October 26, 2020, dismissing the Applicants' judicial review application (*Sanusi v Canada (Citizenship and Immigration)*, 2020 FC 1004 [*Sanusi*].

[2] In the case at bar, the Court was earlier asked to review the decision made by the Refugee Appeal Division [RAD], dismissing the appeal made by the Applicants and confirming the Refugee Protection Division's [RPD] determination that the Applicants are not Convention Refugees, nor persons in need of protection. Both instances found that the Applicants have a viable internal flight alternative [IFA] in Port Harcourt and that they have failed to provide sufficient evidence that relocating to Port Harcourt is unreasonable in their particular circumstances.

[3] Today, the Applicants take issue with paragraph 8 of *Sanusi* where the Court held:

> [8] The comment made by the Board member during questioning about "hiding" was duly examined by the RAD who reviewed the entire record, including the audio recording of the hearing before the RPD. In the end, the Applicants failed to convince the RAD that the RPD erred in law, considering that in the RPD decision the correct test is applied, and further considering the clarification given by the Board member at the hearing. The alleged breach of procedural fairness is a new argument. Therefore, the Applicants could and should have raised the issue of procedural fairness, and asked that the question be specifically reformulated and put by the Board member to the Applicants. That would have allowed the RPD to consider any such answer. The RAD did not breach procedural fairness either. <u>Indeed, before the RAD, the Applicants did not make any meaningful argument that they were prevented of presenting evidence at the hearing before the RPD, or that the RAD should convoke a hearing and allow the Applicants to present further testimony on the issue of IFA</u> (see paragraphs 110(4) and (6) of the [*Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]).
>
> [Emphasis added.]

[4] The Applicants submit that a reading of paragraph 8 of *Sanusi* suggests the Court overlooked the fact that the Applicants had made a request for an oral hearing to the RAD. The Applicants argue that this key matter would have heavily weighted in favour of the Court

granting their application for judicial review. Accordingly, the Applicants are asking this Court to reconsider its judgment and refer the matter back to the RAD for a hearing. Both in their notice of motion for reconsideration and their written representations, the Applicants rely on subsection 110(6) of the IRPA. However, the day before this motion was heard by this Court, the Applicants asked that all references to subsection 110(6) be replaced with paragraph 111(2)(b) of the IRPA.

[5] I pause to mention that in order for the RAD to hold a hearing, subsection 110(6) of the IRPA clearly requires documentary evidence (a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal; (b) that is central to the decision with respect to the refugee protection claim; and (c) that, if accepted, would justify allowing or rejecting the refugee protection claim. Moreover, when read in conjunction with subsection 111(1) and paragraph 111(2)(a), paragraph 111(2)(b) of the IRPA provides that the RAD may refer the matter back to the RPD if its decision is wrong in law, in fact, or in mixed law and fact only if it is of the opinion that it cannot confirm, or set aside the determination and substitute a determination that should have been made by the RPD, without hearing evidence that was presented by the RPD. In this case, the RAD found that the RPD did not err in finding that the Applicants have a viable IFA in Port Harcourt after conducting its own analysis of the entire record, including the audio recording. Accordingly, the RAD dismissed the appeal and confirmed the decision of the RPD that the Applicants are neither Convention refugees nor persons in need of protection, pursuant to paragraph 111(1)(a) of the IRPA.

[6] The test to determine whether a matter that has been accidentally overlooked warrants reconsideration by the Court is a strict one. The jurisprudence clearly establishes that Rule 397 is not intended to be used as a method of appeal. Rather, the issue is "whether there was some matter the Court overlooked in reaching its decision and if so determine if the overlooked matter changes its decision" (*Cedeno v Canada (Minister of Citizenship & Immigration)*, 2000 CanLII 16779 at para 9; *Alsamarraie v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 755 at para 6).

[7] I agree with the Respondent that the Applicants have failed to demonstrate that Rule 397 applies. There was no matter overlooked by the Court in reaching its decision, nor any determinative aspect that was not considered in this case. In dismissing the application for judicial review, this Court thoroughly reviewed the tribunal's reasons and evidence on record and found the allegations of breach of procedural fairness and unreasonableness made by Applicants in their proceedings – including the submissions made in appeal to the RAD – to have no merit whatsoever. Here, the Applicants are simply trying to use Rule 397 as a disguised method of appeal, which is improper (*Lee v Canada (Minister of Citizenship and Immigration)*, 2003 FC 867 at para 7; *Naboulsi v Canada (Citizenship and Immigration)*, 2020 FC 357 at para 7).

[8] The judgment rendered on October 26, 2020 must be read as a whole. The Court dealt with all the issues debated by the parties (*Sanusi* at paras 3-6). The Court notably found that the Applicants' failure to raise the issue of procedural fairness at the earliest occasion amounted to an implied waiver of any perceived breach of procedural fairness, while the impugned decision

was otherwise reasonable in all respects (*Sanusi* at paras 7 to 10). The RAD did not breach procedural fairness either as also found by the Court in its judgment (*Sanusi* at para 8).

[9] For greater certainty, the Court considered that the Applicants had requested a hearing but did not find it determinative in the circumstances. At paragraph 25 of their submissions before the RAD, the Applicants simply stated:

> Alternatively, in light of the RPD's sole reliance on the issue of the IFA, the numerous serious errors in law identified in the Appellants' Memorandum and the incorrect application of *Rasaratnam*, we humbly request a hearing since IFA was the sole determinative issue and if accepted would justify allowing the appellant's refugee claim.
>
> [Emphasis added.]

[10] The mere request to the RAD for an oral hearing without further argument as to why a hearing is warranted is not in itself a "meaningful argument" that the Applicants were prevented from presenting evidence at the hearing before the RPD, or that the RAD should convoke a hearing and allow the Applicants to present further testimony on the issue of IFA (see paragraphs 110(4) and (6) of the IRPA). Indeed, the Applicants have failed to put forth any additional documentary evidence that had not already been considered by the RPD and would fall within subsection 110(6) of the IRPA. Paragraph 111(2)b) of the IRPA is now invoked by the Applicants to justify a hearing before the RPD and not the RAD. This provision does not help the Applicants either. The RAD was entitled to confirm the determination of the RPD pursuant to 111(2)(a) of the IRPA. In doing so, as previously decided by this Court, the RAD did not breach procedural fairness or made an unreasonable error.

[11] For these reasons, the Court dismisses this motion for reconsideration.

ORDER in IMM-6993-19

THIS COURT ORDERS that the motion for reconsideration be dismissed.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6993-19
STYLE OF CAUSE:	ADENIYI IDRIS SANUSI, ARINOLA EUNICE SANUSI, ANUOLUWAPO OLUWADARASIMI SANUSI, ADESOLA OLUWATOYOSI SANUSI v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE IN MONTREAL, QUEBEC
DATE OF HEARING:	NOVEMBER 17, 2020
ORDER AND REASONS:	MARTINEAU J.
DATED:	NOVEMBER 24, 2020

APPEARANCES:

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