Federal Court  Cour fédérale

Date: 20160107

Docket: IMM-878-15

Citation: 2016 FC 14

Ottawa, Ontario, January 7, 2016

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

HENRY MAJEBI, DAISY OYIEAMED SULEMAJEBI, MARIAN OMONIGHO SULEMAJEBI, CHANTEL RECHIA SULEMAJEBI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Henry Majebi and his three children have brought an application for judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board. The RAD confirmed the decision of the Refugee Protection Division [RPD] that Mr. Majebi and his

children are excluded from refugee protection pursuant to s 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] and Article 1E of the *United Nations Convention Relating to the Status of Refugees*, Can TS 1969 No 6 [Convention]. This is because they were found to have residency status substantially similar to that of Italian nationals at the time their claims were heard by the RPD, and they therefore did not need refugee protection in Canada.

[2] For the reasons that follow, I have concluded that the RAD reasonably rejected new evidence that was offered by Mr. Majebi and his children in support of their appeal. I have also found that it was open to the RAD to assess their residency status as of the date of the hearing before the RPD, rather than the date of the RPD's decision. The application for judicial review is therefore dismissed.

II. Facts

[3] Mr. Majebi is a citizen of Nigeria. He claims to be bisexual. He sought refugee status in Canada based on the following allegations.

[4] Mr. Majebi moved from Nigeria to Italy in 1993, where he met his wife Julie Imade Okolo. In 1996, Ms. Okolo was granted temporary resident status in Italy. Beginning in 2002, Mr. Majebi held permanent residence status in Italy.

[5] Mr. Majebi and Ms. Okolo have three children: Daisy, Marian and Chantel. The children were born in Italy and in the United Kingdom. All three children are citizens of Nigeria and no other country.

[6] In July 2012, during a family holiday in Nigeria, Mr. Majebi says that he was confronted about his bisexuality. Members of his extended family threatened to circumcise his wife and children in order to "cleanse the family".

[7] After returning to Italy, Ms. Okolo was threatened by sex trade workers. They demanded money because she had refused to work as a prostitute after they assisted her in leaving Nigeria and establishing herself in Italy.

[8] Mr. Majebi maintains that he and his family now fear persecution in both Nigeria and Italy.

[9] On June 7, 2013, Mr. Majebi fled Italy with his wife and children. They arrived in Canada via the United States on July 29, 2013. They claimed refugee protection on August 13, 2013.

[10] In a decision dated June 25, 2014, the RPD dismissed the refugee claims of Mr. Majebi, Ms. Okolo and all three children. The RPD found that at the time of the hearing, they had residency status that was substantially similar to that of Italian nationals, and they were therefore excluded from receiving refugee protection pursuant to s 98 of the IRPA and Article 1E of the Convention. Pursuant to these provisions, refugee protection will not be conferred if the competent authorities in the country where a person has taken residence recognize the person as having the rights and obligations which accompany the possession of nationality of that country.

[11] Mr. Majebi lost his permanent resident status in Italy on June 7, 2014, after being absent from that country for twelve consecutive months. Mr. Majebi's children held temporary resident permits based on their parents' status in Italy. Daisy lost her status on November 27, 2013, and Marian and Chantel lost theirs on May 31, 2014.

[12] Mr. Majebi, Ms. Okolo and their children appealed the RPD's decision to the RAD. They argued that the RPD had incorrectly assessed their residency status at the time of the hearing, rather than at the time their refugee claims were decided. In support of their appeal, they sought to adduce new evidence regarding their circumstances, in particular the loss of their status in Italy.

[13] In a decision dated January 28, 2015, the RAD declined to admit the new evidence. The RAD allowed Ms. Okolo's appeal because she had only temporary resident status in Italy, which was not substantially similar to the status enjoyed by Italian nationals. Her claim was returned to the RPD for re-determination. However, the RAD upheld the RPD's decision with respect to Mr. Majebi and his children, finding that their status was substantially similar to that of Italian nationals at the time of the hearing before the RPD.

III. Issues

[14] This application for judicial review raises the following issues:

A. Was the RAD's refusal to admit the new evidence reasonable?

B. Did the RAD misapply Article 1E of the Convention?

IV. Analysis

A. *Was the RAD's refusal to admit the new evidence reasonable?*

[15] Questions regarding the admissibility of new evidence before the RAD are subject to review by this Court against the standard of reasonableness (*Singh v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1022 at paras 36-42 [*Singh*]; *Khachatourian v Canada (Minister of Citizenship and Immigration)*, 2015 FC 182 at para 37).

[16] In support of their appeal, Mr. Majebi and his children submitted three new pieces of evidence pursuant to s 110(4) of the IRPA: (i) an affidavit sworn by Mr. Majebi, which the RAD rejected because it repeated evidence that was already in the record; (ii) an affidavit sworn by Ms. Okolo, which the RAD rejected because it repeated evidence that was already in the record or was immaterial; and (iii) four "certificates of residence" from Italy, dated December 6, 2013, which indicated that the three children were under investigation for failing to register their status in Italy.

[17] The RAD noted that the certificates of residence were relevant to the question of the children's status in Italy, which was central to their refugee claims. However, s 110(4) of the IRPA provides that a person may present new evidence on appeal only if it arose after the rejection of the claim; it was not reasonably available at the time of the rejection; or, if it was reasonably available, the person could not reasonably have been expected in the circumstances to have presented the evidence at the time of the rejection. The RAD observed that the documents

"were dated well before the rejection of their claim", and therefore found them to be inadmissible pursuant to s 110(4) of the IRPA.

[18] Mr. Majebi relies on this Court's decision in *Singh* to argue that the RAD must adopt a flexible approach to the admission of new evidence, and that evidence may be considered "new" if it contradicts facts that were found to be determinative by the RPD. Mr. Majebi says that the new evidence contradicted the RPD's finding that the minor children had residency status in Italy at the time of the hearing.

[19] I am satisfied that the RAD applied the correct test for determining whether the proposed evidence was admissible under s 110(4) of the IRPA. The flexible approach described in *Singh* concerns the admissibility of evidence only after the threshold requirements of s 110(4) of the IRPA have been met (*Fida v Canada (Minister of Citizenship and Immigration)*, 2015 FC 784 at paras 6-8; *Deri v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1042 at paras 55-56). Justice Gagné in *Singh* acknowledged that the central issue regarding the admissibility of new evidence is whether "the evidence was not reasonably available, or that the person could not reasonably … have been expected in the circumstances to have presented" the evidence before the RPD (*Singh* at para 58). The RAD noted that the certificates of residence pre-dated the rejection of Mr. Majebi's claim by seven months, and had been available two months before the date of the final hearing before RPD. The RAD also noted that Mr. Majebi and his children had failed to provide any reason why the certificates were not submitted to the RPD before their claims were denied. It was therefore reasonable for the RAD to reject the evidence in accordance with the express statutory requirements of s 110(4) of the IRPA.

B. *Did the RAD misapply Article 1E of the Convention?*

[20] Mr. Majebi says that the proper interpretation and application of Article 1E of the Convention is a question of law that is subject to review by this Court against the standard of correctness. According to the Minister, the reasonableness standard applies. The Minister argues that this Court owes deference to the RAD's interpretation of its home statute, the IRPA, and Article 1E of the Convention, which is closely related to the IRPA. The Minister notes that s 98 of the IRPA incorporates Article 1E of the Convention, and accordingly any interpretation of Article 1E amounts to an interpretation of s 98 of the IRPA.

[21] In *B010 v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 58 at para 24, the Supreme Court of Canada observed that the Federal Court of Appeal has expressed different opinions regarding the standard of review that applies to questions of statutory interpretation that involve a consideration of international instruments. It has sometimes applied the correctness standard (*Hernandez Febles v Canada (Citizenship and Immigration)*, 2012 FCA 324 at paras 22-25), and sometimes the reasonableness standard (*B010 v Canada (Citizenship and Immigration)*, 2013 FCA 87 [*B010*]).

[22] Here, the RAD was interpreting its home statute, the IRPA, and a closely-related international instrument, the Convention. There is a presumption that the standard of review is reasonableness (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC at para 24). There is nothing in this case to displace the presumption. However, the range of reasonable interpretations of a statutory provision may be narrow

(*Canada (Attorney General) v Canadian Human Rights Commission*, 2013 FCA 75; *B010* at para 72).

[23] The RAD assessed whether Mr. Majebi and his children had residency status similar to that of Italian nationals at the time their claims were heard by the RPD. The RAD relied on the Federal Court of Appeal's decision in *Canada (Citizenship and Immigration) v Zeng*, 2010 FCA 118 [*Zeng*], rather than this Court's decision in *Dieng v Canada (Minister of Citizenship and Immigration)*, 2013 FC 450 [*Dieng*]. Mr. Majebi points out that *Zeng* was decided before the creation of the RAD, and argues that the RAD should have applied the test articulated in *Dieng*, pursuant to which a claimant's status is to be determined on the day the claim is decided (*Dieng* at para 21).

[24] Pursuant to the test found in *Zeng*, the RPD is required to consider all relevant factors up to the date of the hearing to determine whether the refugee claimant has status substantially similar to that of the nationals of the country where the claimant has taken residence. If the claimant has status similar to that of other nationals, the claimant is excluded by Article 1E of the Convention. If the claimant does not have similar status, the RPD must look at whether the claimant previously had status and lost it, or had access to the status and failed to acquire it. If the answer is no, the claimant is not excluded under Article 1E. If the answer is yes, the RPD must consider and balance various factors, including whether the reason for the loss of status was voluntary or involuntary, whether the claimant could return to the country of residence, and the risk the claimant would face in the home country.

[25] The RPD issued its decision on June 25, 2014. By this date, it was clear that Mr. Majebi and his children had lost their right to return to Italy because Mr. Majebi's status had expired on June 7, 2014. Mr. Majebi submits that the RAD committed a reviewable error by failing to fully assess the evidence as of the date of the appeal.

[26] The role of the RAD when it considers an appeal of a decision of the RPD is not yet settled. This Court's decision in *Huruglica v Canada (Minister of Citizenship and Immigration)*, 2014 FC 799 [*Huruglica*] is currently before the Federal Court of Appeal.

[27] In *Dhillon v Canada (Minister of Citizenship and Immigration)*, 2015 FC 321 [*Dhillon*], Justice LeBlanc held that an appeal before the RAD is directed at the decision of the RPD, and should therefore be conducted on the basis of the record as it existed at the time of the RPD's decision. Unless the RAD accepts new evidence, the statutory framework that governs an appeal before the RAD requires the RAD to concern itself solely with errors of law, of fact, or of mixed fact and law (*Dhillon* at para 18). However, in *Alyafi v Canada (Citizenship and Immigration)*, 2014 FC 952 [*Alyafi*] at para 13, Justice Martineau held that it could probably be argued that the RAD appeal "is a kind of *de novo* appeal."

[28] In *Canada (Minister of Citizenship and Immigration) v Alsha'bi et al*, 2015 FC 1381 [*Alsha'bi*] at para 36, Justice Strickland discussed a number of decisions of this Court regarding the role of the RAD, including *Alyafi*, before concluding as follows:

> Thus, it can perhaps more accurately be stated that the state of the law on this point remains a live issue, as opposed to the Minister's characterization that the Court has actively refrained from describing the RAD appeal process as *de novo*. Further, based on

> *Alayfi*, until the issue is determined by the Federal Court of Appeal or the Supreme Court of Canada, the RAD will not be found to have necessarily erred by applying either approach (*Alyafi* at paras 51-52; *Djossou* [2014 FC 1080] at para 91; *Taqadees v Canada (Citizenship and Immigration)*, 2015 FC 909 at paras 9-13).

[29] In *Alsha'bi*, which involved the loss of status in a foreign country between the time of the RPD's decision and the appeal before the RAD, Justice Strickland declined to overturn the RAD's decision to substitute its view of the correct disposition based on the change in the appellants' circumstances. This suggests that the RAD in this case could have considered Mr. Majebi's and his children's loss of residency status in Italy, and substituted its view of the appropriate disposition given the change in circumstances following the RPD's hearing. However, the RAD would then have had to consider numerous other factors, including whether the loss of residency status in Italy was voluntary or involuntary. This Court has held that a claimant's choice to allow his or her status in a third country to expire amounts to an impermissible form of asylum-shopping (*Canada (Minister of Citizenship and Immigration) v Choovak*, 2002 FCT 573 at paras 15, 17).

[30] Pending guidance from the Federal Court of Appeal in *Huruglica*, and considering Justice LeBlanc's judgment in *Dhillon*, I am unable to find that the RAD wrongly assessed the residency status of Mr. Majebi and his children as of the date of the hearing before the RPD. This is the approach taken by the Federal Court of Appeal in *Zeng*, and I cannot fault the RAD for following precedent. Even if the RAD could have opted for a different approach, as the RAD appears to have done in *Alsha'bi*, it was not obliged to do so. The approach taken by the RAD in this case was reasonable.

[31] Finally, as noted by the Minister, if Mr. Majebi and his children are unable to return to Italy, they are eligible for a Pre-Removal Risk Assessment before they can be removed to Nigeria.

V. Certified Question

[32] Mr. Majebi asks this Court to certify a question for appeal. The role of the RAD when it considers an appeal of a decision of the RPD is before the Federal Court of Appeal in *Huruglica*. However, I agree with Mr. Majebi that the question of the date on which residency status should be assessed for the purposes of exclusion under Article 1E of the Convention is currently in doubt, and is unlikely to be directly addressed by the Court of Appeal in *Huruglica*.

[33] In *Zeng*, the Federal Court of Appeal observed at paragraph 13 that the date "must be fluid to ensure consideration is given to both the status and the actions of a claimant throughout," but did not extend this fluidity beyond the date of the hearing before the RPD. In *Dieng*, Justice de Montigny was prepared to extend the date to the time of the RPD's decision, although it is unclear whether he intended to depart from *Zeng* by doing so. In *Alsha'bi*, Justice Strickland declined to overturn the RAD's decision to substitute its view of the correct disposition based on the appellant's loss of residency status in a third country following the RPD's decision.

[34] In my view, this matter would benefit from clarification by an appellate court. I therefore certify the following question for appeal:

> In determining whether an individual is excluded from refugee protection under Article 1E of the *United Nations Convention Relating to the Status of Refugees*, is

the assessment of whether the individual has the rights and obligations which are attached to the possession of the nationality of the country in which the person has taken residence to be made at the time of the hearing before the Refugee Protection Division [RPD], at the time of the RPD's decision, or at the time of any appeal before the Refugee Appeal Division?

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. The following question is certified:

> In determining whether an individual is excluded from refugee protection under Article 1E of the *United Nations Convention Relating to the Status of Refugees*, is the assessment of whether the individual has the rights and obligations which are attached to the possession of the nationality of the country in which the person has taken residence to be made at the time of the hearing before the Refugee Protection Division [RPD], at the time of the RPD's decision, or at the time of any appeal before the Refugee Appeal Division?

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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