Federal Court  Cour fédérale

Date: 20171214

Docket: IMM-2372-17

Citation: 2017 FC 1143

Ottawa, Ontario, December 14, 2017

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

TOSAN ERHUN EHONDOR AND TELMA OSASENAGA OGEDEGBE, BY HER LITIGATION GUARDIAN, TOSAN ERHUN EHONDOR

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application by the first named Applicant [the first Applicant] and her 5-year-old daughter [collectively, the Applicants] pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *IRPA*], for judicial review of a decision made by the

Refugee Appeal Division of the Immigration and Refugee Board [the RAD], dated May 12, 2017, dismissing the Applicants' appeal of the decision of the Refugee Protection Division [RPD] that the Applicants are not Convention Refugees or persons in need of protection [the Decision].

II. Facts

[2] The Applicants are both citizens of Nigeria who were smuggled into Canada from the United States in October 2014. At the time, the first Applicant was about eight months pregnant. She gave birth to her second child shortly after arriving in Canada, at which time, the Applicants made a claim for refugee protection, citing fear of abuse and persecution at the hands of the Applicant's former partner [the Former Partner] in Nigeria. The Applicant's second child, needless to say, is a Canadian citizen and therefore is not a party to this proceeding.

[3] The RPD rejected the Applicants' claim in a decision dated January 7, 2015, but the RAD allowed the Applicants' appeal in a decision dated April 22, 2015 and referred the matter back to the RPD.

[4] On August 18, 2015, the RPD again rejected the Applicants' claim for protection, finding that the Applicants could relocate to a different city outside of their home city. The RAD dismissed an appeal. The Applicants applied for judicial review of the second RAD decision. Boswell J granted judicial review and returned the matter to the RAD.

[5] In January 2017, the Applicants submitted additional evidence to the RAD, including an affidavit of a friend of the first Applicant detailing an interaction with the Former Partner in March 2016 in the first Applicant's former city, where the Former Partner allegedly physically assaulted the friend and demanded to know the Applicants' whereabouts. The friend also submitted a police report from the Nigeria Divisional Police detailing that the Former Partner attended her home, demanded to know the location of the Applicants, searched her home and "beat her up seriously". This new evidence was accepted.

[6] The additional evidence also included an affidavit of the first Applicant's mother, describing a similar experience with the Former Partner, also in March 2016. This new evidence was accepted.

[7] On May 5, 2017, the RAD dismissed the Applicants' appeal, holding that the Applicants had an Internal Flight Alternative [IFA].

[8] The RAD's dismissal is the subject of this application for judicial review.

III. Issue

[9] In my view, this matter raises the following issue: was the RAD's IFA finding reasonable?

IV. Standard of Review

[10] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is not necessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." This Court has determined that a review of the RAD's determination of the availability of an IFA is entitled to deference: *Pidhorna v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1 at para 39 per Kane J: "[t]he test for an IFA is well established. There is a high onus on the applicant to demonstrate that a proposed IFA is unreasonable (*Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164, [2000] FCJ No 2118 (FCA))." See also *Olarere v Canada (Minister of Citizenship and Immigration)*, 2017 FC 385 per Russell J at para 19: "[d]ecisions of the RAD in the context of an IFA analysis are reviewed under the standard of reasonableness: *Ugbekile v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1397 at paras 12-14." Therefore, reasonableness is the standard of review for this IFA determination.

[11] There are two aspects of an IFA that must be considered: (1) risk of persecution, and (2) reasonableness of the claimant moving to the IFA: *Hamdan v Canada (Minister of Immigration, Refugees and Citizenship)*, 2017 FC 643, per Crampton CJ.*:*

> [10] There are two parts to the test for an IFA.
>
> [11] First, in the context of section 96 of the IRPA, the RPD must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the part of the country to which an IFA exists (*Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589, at 593 (FCA) [*Thirunavukkarasu*]). In the context of section 97, the corresponding test is that the RPD must be satisfied that the

> claimant would not be personally subjected to a danger described in paragraph 97(1)(a), or to a risk described in paragraph 97(1)(b).
>
> [12] Second, for the purposes of both section 96 and section 97 of the IRPA, the RPD must determine that, in all of the circumstances, including the circumstances particular to the claimant, conditions in the part of the country where a potential IFA has been identified are such that it would not be objectively unreasonable for the claimant to seek refuge there, before seeking protection in Canada (*Thirunavukkarasu*, above, at 597). In this regard, the threshold for objective unreasonableness is "very high" and "requires nothing less than the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to" the area where a potential IFA has been identified (*Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164, at para 15 (FCA) [*Ranganathan*]). Stated differently, objective unreasonableness in this context requires a demonstration that the claimant would "encounter great physical danger or […] undergo undue hardship in travelling" to the IFA (*Thirunavukkarasu*, above, at 598). In addition, "actual and concrete evidence of such conditions" must be adduced by the claimant for refugee protection in Canada (*Ranganathan*, above, at para 15).

[12] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[13] The Supreme Court of Canada also instructs that judicial review is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole:

Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper,

Ltd, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

V. Analysis

[14] I have concluded the determinative issue is whether the Decision is unreasonable because of its assessment of the first part of the two-part test for an IFA, namely, risk of persecution.

[15] The RAD considered evidence of Boko Haram in the IFA city. It also considered the risk that the Former Partner would locate the Applicants in the IFA city. In this connection, the RAD concluded:

> [44] [IFA city] is a large city and the Applicants have not established that they face a serious possibility of persecution there, or that it is unreasonable, in all of the circumstances, for them to seek refuge there. They may need to be selective with respect to whom they inform of their new location, trusting this information only to those who will not pass it on to the agent of persecution. However, in the RAD's view this type of discretion does not impinge on any basic human rights and it is not unreasonable to expect the Appellants to exercise such caution.

[16] In the first sentence of the paragraph just quoted, the RAD applied the established legal test for the first part of an IFA assessment, by asking itself, and making a finding on, whether the Applicants had established that they face a serious possibility of persecution in the IFA. In my view, this part of the test is binary and I am satisfied – to that point – that the RAD's conclusion might have been found reasonable.

[17] However, the RAD acting reasonably must directly apply the legal standard set by the Supreme Court of Canada, the Federal Court of Appeal and jurisprudence of this Court, in respect of the first part of the two-part test for an IFA (and, of course the second part as well, which is not in issue here). Addressing the legal standard directly means making an unambiguous finding that does not invite further inquiry as to what exactly the tribunal meant or intended to mean.

[18] The RAD's conclusion runs afoul of this requirement due to the qualifiers the RAD added after its finding on risk of persecution. The RAD qualified its risk of persecution finding in three respects. First, the RAD required the Applicants to be "selective" about who they inform of their move to the IFA city. Second, the RAD concluded that the Applicants must use "discretion". Third, the RAD told the Applicants to exercise "caution".

[19] I do not accept the Applicants' argument that the RAD's finding was so seriously qualified to the extent that it is analogous to *Ohakam v Canada (Minister Citizenship and Immigration)*, 2011 FC 1351 at para 4 per Campbell J, where, the Court set aside the tribunal's IFA finding because it required the applicant "to make a secret return to Nigeria to what amounts to a life in hiding and exclusion from her natural support group, being her extended family." [Emphasis in original.]

[20] However, in the case at bar the three qualifiers taken cumulatively do erode the RAD's initial conclusion to such an extent that the Decision is unreasonable. These three cautionary qualifications invite inquiry. They give rise to an ambiguity that is not consistent with what the

RAD originally concluded, namely that the Applicants had not established that they face a serious possibility of persecution. With respect, the RAD's qualified finding creates an impermissible half-way house in the refugee risk of persecution determination.

[21] In opposition, counsel for the Respondent submitted that the qualifiers should be taken in context. I agree. But here, as noted above, while the opening sentence in the RAD's initial conclusion might have been found reasonable, the Decision taken as a whole ceases to be reasonable when read with the qualifications that follow.

[22] Notably, I was not pointed to any case where either the RAD or the RPD qualified a finding on risk of persecution to the extent the RAD did here.

[23] In my view, the test for the first part of an IFA was unreasonably weakened. As a result, the Decision is not defensible on the law, contrary to *Dunsmuir*'s requirements. Therefore the Decision must be set aside because it does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[24] Neither party proposed a certified question, and none arises.

JUDGMENT

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

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Ronald Poulton as agent for Clifford Luyt	FOR THE APPLICANTS
Christopher Ezrin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Clifford Luyt Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANTS
Nathalie G. Drouin Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT