Federal Court  Cour fédérale

Date: 20181115

Docket: IMM-1806-18

Citation: 2018 FC 1154

Ottawa, Ontario, November 15, 2018

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

JULIANA DAMILOLA BOLUWAJI
OLAKUNLE JOSHUA BOLUWAJI
ANJOLAOLUWA DAMILOLA BOLUWAJI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the decision by the Refugee Appeal Division of the Immigration and Refugee Board [RAD] dated March 8, 2018 [the Decision]. In the Decision, the RAD found that the Refugee Protection Division [RPD] erred in determining that

the Applicants had a viable Internal Flight Alternative [IFA], but substituted the city of Abuja as a viable IFA and therefore dismissed the appeal.

II. Background

[2] The Applicants, Juliana Boluwaji [the Principal Applicant], Olakunle Boluwaji [the Male Applicant], and Anjolaoluwa Boluwaji [the Minor Applicant], are citizens of Nigeria. The Principal Applicant and the Male Applicant are married; the Minor Applicant is their daughter.

[3] The Male Applicant and the Minor Applicant are members of a royal family [the Royal Family] in Lagos, Lagos State, Nigeria's largest city.

[4] The Applicants fear that members of the Royal Family want to perform female genital mutation on the Principal Applicant and the Minor Applicant.

[5] In particular, the Applicants fear two influential members of the Royal Family, both uncles of the Male Applicant. The first, Oba Rilwanu Akinlolu [the King], the Oba of Lagos and the head of the family, is a former high ranking police official who retired from the police in 2002. The second, Amos Ajiki, is the Chief of Lagos Island.

[6] The Applicants arrived in Canada on February 22, 2017, and claimed refugee status pursuant to sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA].

[7] In a decision dated June 27, 2017, the RPD found that the Applicants were neither Convention refugees pursuant to section 96 of the IRPA nor persons in need of protection pursuant to section 97 of the IRPA. This finding was based on the Applicants having a viable IFA in Port Harcourt, Nigeria.

[8] The Applicants appealed to the RAD.

[9] The issues before the RAD were (1) whether the RPD erred in finding that the Royal Family does not have particular influence with the police in Nigeria, and (2) whether the RPD erred in finding that Port Harcourt would be a suitable IFA.

[10] With respect to the first issue, the RAD conducted an independent analysis of the evidence that was before the RPD, and concluded that there was insufficient evidence to show that the Royal Family has particular influence to order the police to enforce female genital mutilation against the Principal Applicant and the Minor Applicant.

[11] With respect to the second issue, the RAD found that the RPD erred in its assessment of Port Harcourt as a suitable IFA, as although female genital mutilation is officially illegal pursuant to a federal law, the *Violence Against Persons (Prohibition) Act* [the VAPP], there is a lack of enforcement of the VAPP in many regions, including Port Harcourt.

[12] However, the RAD went on to consider the suitability of Abuja, the capital city of Nigeria, as an alternative IFA.

[13] The Applicants made written submissions to the RAD on the suitability of Abuja as an IFA. The Applicants argued that Abuja is not a safe IFA, as the Royal Family has particular links to the police which would allow them to override police protections that would otherwise be available in Abuja. The RAD rejected these submissions, finding that police protections would be available to the Applicants in Abuja.

[14] The RAD reviewed the evidence and concluded that the VAPP is enforced in Abuja. For these reasons, the RAD found that Abuja would be a safe and reasonable IFA for the Applicants. The RAD dismissed the Appeal and confirmed the overall decision of the RPD.

III. Issues

[15] The issues are:

A. Did the RAD err in its application of paragraph 111(1)(b) of the IRPA?

B. Did the RAD err by misevaluating the evidence regarding the suitability of Abuja as an IFA?

C. Did the RAD make an unreasonable finding of fact at paragraph 23 of the Decision?

IV. Standard of Review

[16] When reviewing a decision of the RAD, the standard of review is reasonableness. Issues of procedural fairness are reviewed using the correctness standard.

V. Analysis

A. *Did the RAD err in its application of paragraph 111(1)(b) of the IRPA?*

[17] The Applicants argue that the RAD exceeded its purview under subsection 111(1) of the IRPA, which reads:

> 111 (1) After considering the appeal, the Refugee Appeal Division shall make one of the following decisions:
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> (a) confirm the determination of the Refugee Protection Division;
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> (b) set aside the determination and substitute a determination that, in its opinion, should have been made; or
>
> (c) refer the matter to the Refugee Protection Division for re-determination, giving the directions to the Refugee Protection Division that it considers appropriate.

[18] The Applicants submit that after finding Port Harcourt to not be a viable IFA, the RAD misapplied paragraph 111(1)(b) by considering Abuja and finding that Abuja would be a viable IFA. The Applicants submit that the only option available to the RAD after finding Port Harcourt to be unsuitable was to substitute its opinion that Port Harcourt was not a viable IFA.

[19] Subsection 111(1) of the IRPA allows the RAD, when considering an issue raised on appeal, to independently weigh the evidence in the RPD's record. Justice Strickland summarized the proper approach in *Tan v Canada (Citizenship and Immigration)*, 2016 FC 876 at paragraph 40 [*Tan*]:

> [40] …with respect to findings of fact and mixed fact and law which raise no issue of credibility, the RAD is to carefully review

> the RPD's decision, applying the correctness standard, and then carry out its own analysis of the record to determine whether the RPD erred. If so, the RAD may substitute its own determination on the merits of the claim to provide a final determination. That is, the RAD is to conduct a hybrid appeal. The RAD is not required to show deference to the RPD's findings of fact. And, when addressing issues raised by the parties, the RAD is entitled to perform an independent assessment of the record before the RPD and to refer to evidence that supports the findings or conclusions of the RPD. In my view, the necessary corollary of this is that the RAD is also permitted to refer to evidence in the record before the RPD to explain why it believes the RPD erred with respect to an issue raised on appeal or why it does not agree with the RPD's findings of fact. Such reasons do not, in and of themselves, give rise to a new issue…
>
> [Citations omitted, emphasis added]

[20] The RAD followed the approach outlined in *Tan* – addressing the issue of a suitable IFA, independently analyzing the evidence that was before the RPD, and concluding that Abuja would be a suitable IFA. There was nothing improper about the RAD going on to consider Abuja as a suitable IFA after rejecting Port Harcourt. Additionally, any concerns regarding procedural fairness are assuaged as the Applicants were provided with the opportunity to make written submissions before the RAD on the suitability of Abuja as an IFA.

[21] The RAD was both reasonable and correct in going on to consider the suitability of Abuja as an IFA after having rejected Port Harcourt.

B. *Did the RAD err by misevaluating the evidence regarding the suitability of Abuja as an IFA?*

[22] The Applicants argue that in identifying Abuja as a suitable IFA, the RAD erred by failing to consider that, while the evidence establishes that the VAPP has been enacted in Abuja,

the documentary evidence also establishes that the VAPP is not enforced in Abuja. The Applicants argue that the RAD failed to appreciate the distinction between the enactment of a law and its enforcement, and was thereby unreasonable in concluding that Abuja would be a suitable IFA.

[23] I accept that the documentary evidence before the RAD demonstrates that while the VAPP may be enacted in Abuja, it is not enforced to any significant extent. I note in particular a passage of the Response to Information Request which reads:

> Sources note the existence of laws in Lagos State which concern the practice of FGM (Doctoral Candidate 8 Sept. 2016; ICIR 7 Feb. 2015). However, according to ICIC, "even in states that have enacted legislation against it [FGM], the laws are weak in [*sic*] and most times not even implemented"…

[24] This conclusion is also supported by other passages of the documentary evidence. The RAD failed to recognize and consider the distinction between the enactment of the VAPP and its enforcement.

[25] The Respondent opposes this argument on procedural grounds; namely, that this distinction between enactment of a law and its enforcement was not at issue before the RAD. The Respondent points to the Applicants' written submissions before the RAD, which in one part appear to be premised on the idea that the VAPP is enforced generally in Abuja.

[26] I recognize that it is not appropriate to make a novel argument on judicial review that was not made before the RAD (*Khan v Canada (Citizenship and Immigration),* 2016 FC 855 at paras 29-30). However, I find that the issue of enforcement versus enactment was very much in issue

before the RAD, as it was among the reasons the RAD found Port Harcourt to not be a suitable IFA. Given this, the RAD erred by conflating enforcement of the VAPP with enactment when it went on to consider the suitability of Abuja. Counsel's written submissions before the RAD, while unfortunate, do not detract from this error.

[27] The RAD's decision on this issue is unreasonable and on this ground alone the application must be returned for reconsideration.

C. *Did the RAD make an unreasonable finding of fact at paragraph 23 of the Decision?*

[28] One of the issues before the RAD was whether the RPD erred in finding that the Royal Family does not have particular influence with the police in Nigeria. The RAD conducted an independent analysis of the evidence, and concluded that there was insufficient evidence to show that the Royal Family has particular influence to order the police to enforce female genital mutilation against the Principal Applicant and the Minor Applicant.

[29] The Applicants submit that in reaching this conclusion, the RAD erred in finding at paragraph 23 of the Decision that:

> Even if the RAD were to accept that the King had a rank as high as Assistant Inspector-General as alleged in the Memorandum, it still remains that the King allegedly retired from the police in 2002. There is no evidence to show that the King would still be influential with the police over 15 years after he left the force.

[30] The Applicants submit that this no evidence finding was a fatal error, as it failed to address evidence of the influence of the Royal Family generally and the King in particular.

[31] I disagree. The RAD's reasoning, outlined at paragraphs 18 to 25 of the Decision, involves a weighing of the evidence before it as to the influence of the Royal Family. In the course of this reasoning, the RAD noted that even if it were to accept that the King had held the higher rank of Assistant Inspector-General (which it did not accept), the King does not have influence which would allow the Royal Family to order the police to enforce female genital mutilation against the Principal Applicant and the Minor Applicant. The Applicants are asking this Court to re-weigh the evidence that was before the RAD and infer a fact that the RAD was unwilling to infer.

[32] The rejection of an inferred fact being put forward in the face of a lack of direct evidence is owed deference, and should be reviewed on the reasonableness standard (*Bercasio v Canada (Citizenship and Immigration)*, 2016 FC 244 at para 33).

[33] The RAD's weighing of the evidence as to the influence of the Royal Family was reasonable.

JUDGMENT IN IMM-1806-18

THIS COURT'S JUDGMENT is that:

1. The application is allowed and the matter is remitted to a different Board for reconsideration;

2. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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