

Federal Court



Cour fédérale

Date: 20190924

Docket: IMM-871-19

Citation: 2019 FC 1214

Ottawa, Ontario, September 24, 2019

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Applicant

and

**ALEXANDER CHUKUEMEKA
MADUABUNA**

Respondent

JUDGMENT AND REASONS

[1] On January 15, 2019, the Refugee Appeal Division [RAD] dismissed the Minister's appeal of a Refugee Protection Division [RPD] finding that the Respondent, a five year old boy with dual United States and Nigerian citizenship, was a person in need of protection under subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The Respondent's family are all Nigerian citizens. None of them are dual citizens with the United States. The RPD granted the family and the Respondent refugee protection on being satisfied that they were persons in need of protection and there was no place in Nigeria to which they would be able to safely relocate and not be in danger.

[3] The RPD had determined that as the Respondent did not make a claim against the United States, but only against Nigeria, he could receive refugee protection.

[4] The Minister appealed the RPD decision to the RAD on the basis that the RPD failed to consider the Respondent's American citizenship.

[5] The RAD dismissed the appeal on finding that it had no jurisdiction to hear it because of paragraph 110(2)(d) of the *IRPA*, which bars appeals to the RAD under the *Safe Third Country Agreement* (STCA) with the United States.

[6] The Minister brought this application for judicial review of the RAD's decision, seeking to set it aside and have the matter referred back for redetermination by a different panel member. No materials were submitted on behalf of the Respondent but his father attended the hearing of this application at the invitation of counsel for the Applicant.

[7] The critical fact in this matter is that the family did not enter Canada at a location that is a port of entry. They crossed over from the United States into Canada irregularly, at a location in Quebec.

[8] The Minister relies on the recent decision of this Court by Mr. Justice Fothergill in *Zhao v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1384 [*Zhao*] where he held that the bar on making a claim before the RPD and appealing an RPD decision to the RAD does not apply where claimants enter Canada irregularly.

[9] I agree that Justice Fothergill's analysis in *Zhao* applies to this matter:

A plain reading of the applicable legislative provisions confirms that a refugee claimant who enters Canada from the United States is not ordinarily eligible to have his or her claim determined by the RPD (IRPA, s 101(1)(e)). However, the IRPA also provides that regulations may govern the application of this provision. Paragraph 159.4(1)(a) of the Regulations states that s 101(1)(e) does not apply to a claimant who seeks to enter Canada at a location that is not a point of entry. The restriction on appeals to the RAD found in s 110(2) of the IRPA arises only when a claimant enters Canada from the United States and is referred to the RPD by an officer at a port of entry pursuant to one of the exceptions to the STCA.

(*Zhao* at paragraph 15, my emphasis)

[10] The RAD did not take into consideration how the Respondent crossed into Canada. If it had, then it would have realized it had jurisdiction to hear the matter. This application is therefore allowed, the Decision is set aside and this matter is returned to the RAD for redetermination by a different panel member.

[11] The Respondent is an innocent child inadvertently caught up in the intricacies of the *IRPA* and its regulations. At the conclusion of the hearing, there was a discussion with counsel and the father as to what he could do so that his son may legally remain in Canada. It is to the credit of the Applicant that they have contemplated possible solutions and will communicate them to the Court and to the father once they have been further explored.

JUDGMENT in IMM-871-19

THIS COURT'S JUDGMENT is that:

1. The application is granted.
2. The Decision is set aside and the matter is returned to the RAD for redetermination by a different panel member.
3. There is no serious question of general importance for certification.
4. No costs.

"E. Susan Elliott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-871-19

STYLE OF CAUSE: THE MINISTER OF CITIZENSHIP AND
IMMIGRATION v ALEXANDER CHUKUEMEKA
MADUABUNA

DATE OF HEARING: SEPTEMBER 23, 2019
(BY VIDEO CONFERENCE)

JUDGMENT AND REASONS: ELLIOTT J.

DATED SEPTEMBER 24, 2019

APPEARANCES:

Ms Amy Lambiris

FOR THE APPLICANT

Mr. Udo Alexander Maduabuna

ON BEHALF OF THE
MINOR RESPONDENT

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