Federal Court  Cour fédérale

Date: 20191028

Docket: IMM-1217-19

Citation: 2019 FC 1338

Ottawa, Ontario, October 28, 2019

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

OLASUBOMI ABOSEDE IPAYE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ms. Ipaye, is a citizen of Nigeria who fears her late spouse's family.

[2] The Refugee Protection Division [RPD] of the Immigration and Refugee Appeal Board refused her claim for protection on the basis that she had failed to establish her identity. On appeal, and after having considered new evidence, the Refugee Appeal Division [RAD] accepted

that Ms. Ipaye had established her identity. However, the RAD dismissed the appeal on the basis that Ms. Iapye had an Internal Flight Alternative [IFA] in Nigeria, a question that had not been decided by the RPD.

[3] Pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA] Ms. Ipaye now seeks judicial review of the RAD's decision.

[4] In written submissions Ms. Ipaye frames the issues for review as being the RAD's jurisdiction to consider an IFA and the reasonableness of the IFA decision.

[5] I have framed the issues as follows:

A. Did the RAD err by dismissing the appeal on a ground not addressed by the RPD?

B. If not, was the RAD's IFA analysis reasonable?

[6] For the reasons that follow I am of the opinion that the RAD did not err in considering the IFA issue, and that the RAD's IFA-related findings and conclusions are reasonable. The application is dismissed.

II. Standard of Review

[7] The standard of review to be applied by this Court when reviewing decisions of the RAD, including decisions relating to an IFA, is reasonableness (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at paras 30, 34 and 35 [*Huruglica*]; *Okechukwu v Canada (Citizenship and Immigration)*, 2016 FC 1142 at paras 17 and 20 [*Okechukwu*]).

[8] True issues of jurisdiction are to be reviewed against a standard of correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 59 [*Dunsmuir*]). However, the RAD's consideration of the IFA issue in this matter more appropriately engages a review of the RAD's interpretation of its home statute, specifically sections 110 and 111 of the IRPA. Where a tribunal is interpreting its home statute there is a presumption that the reasonableness standard of review applies to that interpretation (*Huruglica* at paras 30 – 33; *Dunsmuir* at para 54). The issue raised here is not one of true jurisdiction but rather one of interpretation. I will adopt a reasonableness standard of review in considering all of the issues raised.

III. Analysis

[9] In the course of oral submissions Ms. Ipaye's counsel raised fairness arguments relating to the RAD's failure to grant an oral hearing, its consideration of a jurisprudential guide relating to IFAs in Nigeria, its consideration of documentation contained in the then-current National Documentation Package, and its assessment of certain evidence.

[10] None of these issues were raised in the written submissions seeking leave that were filed on Ms. Ipaye's behalf.

[11] The respondent's leave memorandum highlights that "[t]he only argument the Applicant has made in this application is that the RAD erred by basing its decision on a different ground than the RPD". Ms. Ipaye did not file a reply memorandum. The respondent now objects to these new issues being raised.

[12] The Order granting leave allowed for Ms. Ipaye to file further affidavit evidence and a further memorandum of argument. She filed neither. A party cannot, in oral submissions, raise issues or arguments not contained in written submissions (*Radha v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1040 at paras 13 – 19). The fairness arguments are new. The respondent's objection is therefore maintained.

[13] Regardless, the fairness arguments, as presented, would have been of little assistance to the applicant: the alleged fairness breaches are not evident on the record; the arguments were disjointed; and much of the relevant procedural evidence in the record, including the impact of three separate notices from the RAD inviting submissions from the applicant on the IFA issue, was not addressed.

A. *Did the RAD err by dismissing the appeal on a ground not addressed by the RPD?*

[14] Ms. Ipaye submits that sections 110 and 111 of the IRPA cannot be interpreted as providing the RAD with the authority to reject a claim on a ground not considered by the RPD and that the IRPA does not allow the RAD to create a new record or seek submissions on matters not considered by the RPD.

[15] In *Huruglica*, the Federal Court of Appeal considered sections 110 and 111 of the IRPA. Based upon this analysis Justice Gauthier, writing for the Court, describes the role of the RAD, at paragraph 78:

> [78] At this stage of my analysis, I find that the role of the RAD is to intervene when the RPD is wrong in law, in fact or in fact and law. This translates into an application of the correctness standard

> of review. If there is an error, the RAD can still confirm the decision of the RPD on another basis. It can also set it aside, substituting its own determination of the claim, unless it is satisfied that it cannot do either without hearing the evidence presented to the RPD: paragraph 111(2)(b) of the *IRPA*. [Emphasis added.]

[16] The jurisprudence is clear. The RAD may, on the basis of the record before the RPD and any additional evidence or submissions properly placed before it on appeal (IRPA subsections 110(3), (4) and (5) and (6)), decide a matter on a ground not considered by the RPD. However, where the RAD is to determine a matter not previously considered, fairness requires that it give an appellant notice and the opportunity to make submissions (*Okechukwu* at para 26; *Deng v Canada (Citizenship and Immigration),* 2016 FC 887 at para 14).

[17] In this case the RAD did give notice. The RAD, on three separate occasions, invited submissions from Ms. Ipaye, through her counsel, on the IFA issue. Ms. Ipaye ultimately filed an affidavit in response. No objection was made to the RAD's consideration of an IFA and no written submissions were filed.

[18] The RAD did not err in dismissing the appeal on the ground that Ms. Ipaye had a viable IFA.

B. *Was RAD's IFA analysis reasonable?*

[19] Ms. Ipaye identifies the reasonableness of the IFA decision as an issue but no submissions were made. I have nonetheless considered the RAD's IFA analysis.

[20] The RAD correctly identified the two-pronged IFA test: the RAD may find that a claimant has an IFA if it is satisfied that (1) the claimant would not face a serious possibility of persecution in the part of the country to which she may flee; and (2) she can reasonably seek refuge in that part of the country. The RAD applied the evidence and information contained in the record. This included Ms. Ipaye's oral evidence before the RPD, her documentary evidence, country condition evidence and the jurisprudential guide. There was no suggestion in either oral or written submissions that any of this information was not available to Ms. Ipaye or her counsel.

[21] The RAD engaged in detailed consideration of both the possibility of persecution and the reasonableness of the proposed IFAs. In doing so the RAD addressed the risk of discovery by the identified agents of persecution and whether an individual with Ms. Ipaye's profile could viably relocate in Nigeria. The RAD also addressed the conditions and circumstances Ms. Ipaye would face as a female refugee claimant in the prosed IFAs including travel, language, education, employment, accommodation, religion, and healthcare. The RAD's analysis engages with the evidence and links the evidence to the conclusions reached. The IFA analysis reflects the required elements of justification, transparency and intelligibility; the decision falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law (*Dunsmuir* at para 47).

IV. Conclusion

[22] The application is dismissed. The parties have not identified a serious question of general importance for certification and none arises.

JUDGMENT IN IMM-1217-19

THIS COURT'S JUDGMENT is that:

1. The application is dismissed; and

2. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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