Federal Court  Cour fédérale

Date: 20191126

Docket: IMM-4284-18

Citation: 2019 FC 1507

Ottawa, Ontario, November 26, 2019

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

JANEL TSHILUMBA
JESSE TSHILUMBA
JAINA TSHILUMBA

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. The Facts

[1] The Applicants, Janel Tshilumba, Jesse Tshilumba and Jaina Tshilumba, are citizens of South Africa. Their mother, Mafuta Karin Tsilumba, is a citizen of the Democratic Republic of Congo and a permanent resident of South Africa.

[2] On September 18, 2017, the Applicants, along with their US-born brother, Jaden and their mother, approached the port of entry at Niagara Falls, Ontario from the US. They intended to claim refugee protection and proceed into Canada.

[3] The Applicants were unable to satisfy the port of entry Officer [Niagara Falls Officer] that they had an "anchor relative" in Canada. The Officer determined that the Applicants were ineligible to have their claims for refugee protection referred to the Refugee Protection Division [RPD] as they were seeking entry to Canada from a "safe third country". He then entered exclusion orders against the Applicants. The exclusion orders prohibited the Applicants from entering Canada for a period of one year. The Officer also noted that the Applicants' mother had already been granted refugee protection in South Africa.

[4] The Applicant's mother refused to sign required paperwork because she wanted to stay in Canada. She also refused to sign forms withdrawing Jaden's refugee claim, who, as a US citizen, was not barred from initiating a refugee claim at the land border crossing. The Niagara Falls Officer determined that it was in Jaden's best interests to remain with his mother and return to the US as he was a minor in her custody.

[5] One month later, in October 2017, the Applicants, their mother and Jaden entered Canada through an unauthorized port of entry near Lacolle, Quebec. After being processed by a Canada Border Services Agency [CBSA] Officer [Lacolle Officer], the Applicants were not permitted to make refugee claims because they had previously been determined ineligible in accordance with paragraph 101(1)(c) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

They were given applications for a pre-removal risk assessment, however, they were barred from having their claims for protection referred to the RPD.

[6] Approximately eight months later, after retaining counsel, the Applicants submitted a letter to the CBSA seeking to have the Niagara Falls Officer reconsider his decision dated September 18, 2017, on the basis that documentation enclosed with the letter demonstrated that they had an anchor relative in Canada.

[7] On August 8, 2018, the Niagara Falls Officer refused the reconsideration request stating that his initial decision was legal and correct.

[8] By this application, the Applicants seek judicial review of the decision of the Niagara Falls Officer to refuse to reconsider his decision. They submit that the reconsideration decision is unreasonable for two reasons. First, the Niagara Falls Officer erred by failing to recognize that he had the discretion to reconsider his initial decision. Second, he erred by failing to review and analyze the documentation submitted as part of the request for reconsideration. The Applicants maintain that the documentation clearly establishes that they had an aunt, an anchor relative, living in Canada.

[9] In my view, the application for judicial review should be dismissed as the Applicants have failed to establish that a positive decision by this Court would have any practical effect on their rights or any collateral consequences for them.

[10] As conceded by Applicants' counsel at the hearing of the application, what the Applicants are ultimately seeking is the right to have their refugee claims considered by the RPD. However, such relief is no longer available to the Applicants given the decision of the Lacolle Officer.

[11] The Applicants had to demonstrate that they had an anchor relative at the time they initially sought to enter Canada on September 18, 2017, by virtue of the clear provisions of section 159.5 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations]. The Applicants failed to do so when they appeared at the port of entry at Niagara Falls. The Applicants do not dispute that the ineligibility decision of the Niagara Falls Officer was correct at the time it was made.

[12] The Regulations provide for a process of establishing the existence of an anchor relative at the port of entry, but do not provide any such process from within Canada.

[13] The proper course of action for the Applicants when faced with the exclusion orders and ineligibility determination in September 2017 was to either seek judicial review or marshal evidence to demonstrate that they had an anchor relative and seek reconsideration of the Niagara Falls Officer's determination when they obtained the evidence. The Applicants chose instead to ignore the exclusion orders and engage in self-help by entering Canada through an unauthorized border crossing.

[14] In my view, it would constitute an abuse of the IRPA and the Regulations to allow the Applicants to proceed incrementally to challenge perfectly valid legal decisions to trigger a benefit the Applicants want, but to which they are not entitled. I agree with the Respondent that if the Applicants wanted to have their refugee claims referred to and considered by the RPD, they should not have approached Canada until the existing ineligibility determination had first been set aside by some proper process.

II. Conclusion

[15] For the above reasons, the application for judicial review is dismissed.

[16] The parties have not proposed any questions for certification.

JUDGMENT in IMM-4284-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No questions are certified.

"Roger R. Lafrenière"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4284-18
STYLE OF CAUSE:	JANEL TSHILUMBA ET AL v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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