Federal Court  Cour fédérale

Date: 20200219

Docket: IMM-3472-19

Citation: 2020 FC 267

Toronto, Ontario, February 19, 2020

PRESENT: Mr. Justice Diner

BETWEEN:

MISRAT ADEBOLA SADIQ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant and her son lost their refugee claims before the first refugee tribunal due to a lack of credibility. They appealed. The appellate tribunal re-examined those credibility findings. It reversed each of them and, for the minor son, found a well-founded fear of persecution. However, it did not so find for the mother, the Applicant in this proceeding. She now brings this judicial review seeking to overturn her refusal. I agree that the Decision

regarding the mother was unreasonable, and will ask the appellate tribunal to reconsider the matter.

I. Background

[2] The Applicant and her minor son (now 11 years of age) are citizens of Nigeria. On September 4, 2017, they made a refugee claim in Canada. The refugee claim was based on threats from the Applicant's husband's family and on her son's membership in a particular social group, namely, a person with autism. He was non-verbal and began suffering from seizures at the age of three, and he was diagnosed in Nigeria as having developmental delay. In Canada, he was further diagnosed with Fragile X Syndrome and Autism Spectrum Disorder with Epilepsy.

[3] The following facts ultimately led to the Refugee Appeal Division [RAD] finding that the Applicant's son was a Convention refugee. When the Applicant's in-laws learned that there was no cure for his condition, they began to ostracize him. As he grew, they began to talk of "cleansing" him through a ritual killing, due to their belief that his disability was caused by evil forces and reflected poorly on their family.

[4] Between June 2012 and June 2015, the Applicant's in-laws thrice raised the issue of traditional cleansing to cure the son. The Applicant refused. Her husband went to the police and the local Imam for assistance. Both declined to intervene.

[5] At the end of July 2015, the Applicant's in-laws advised her that the ritual would take place on October 5, 2015, and that she and her son would have to be in the family village the day

before to prepare. Her in-laws told her that while the priest performed the rituals on her son, she would have to observe, chant and say prayers so that the evil would not affect the rest of the family.

[6] Towards the end of September 2015, the Applicant's husband sent her and their son to a nearby town to hide with a friend to avoid the cleansing ritual. When the Applicant did not arrive at the village on the appointed date for the cleansing, her in-laws went looking for her at her family home. Her husband lied and said that she was caring for a sick friend. Three days later, the Applicant's in-laws went to her friend's home to advise that the rituals would be delayed one month and take place on November 15, 2015. According to the Applicant's brother's affidavit, her husband's family had forced disclosure of her hiding location, by holding and beating him until he shared that location.

[7] The Applicant and her husband decided that she and her son had to leave Nigeria. She stayed in hiding until leaving the country and arrived in the United States on November 12, 2015.

[8] Soon after arriving in the U.S., the Applicant's husband spoke with her on the phone and informed her that his family's elders had come to look for her and her son. On the orders of the head of her husband's family, a Chief, the police questioned and detained the friend with whom she had hid. Meanwhile, the Applicant's husband continued to receive monthly visits from his family to question him about the location of the Applicant and her son. They made a refugee claim in the U.S. but ultimately left to make a claim in Canada in 2017.

[9] The first level tribunal, the Refugee Protection Division [RPD], denied the Applicant and her son's refugee claim on August 13, 2018. While not disputing the medical testimony, the RPD, as mentioned above, based its refusal on four credibility concerns, namely a discrepancy in testimony, implausibility, and delays both in obtaining the son's passport and then in making a refugee claim. On August 29, 2018, the Applicants filed an appeal with the RAD, which is what this Court will now review.

II. The Decision under Review and Issues Raised by the Applicant

[10] On May 14, 2019, the RAD dismissed the Applicant's appeal of the RPD decision, but allowed her son's. In doing so, it overturned all four of the RPD's negative credibility findings. In short, the RAD found that the objective country documentation supported the appellants' claim, including that children with the son's profile can be at risk, with insufficient state protection and with no viable internal flight alternative in this young boy's circumstances.

[11] However, the RAD dismissed his mother's appeal, providing its justification for that conclusion in the following two paragraphs of its Decision:

> [45] The principal Appellant's claim is based on the minor Appellant's disability. Although she indicated that the paternal family expected her to participate in the minor Appellant's ritual killing, there was no evidence provided that the principal Appellant was discriminated or persecuted by the paternal family or the Nigerian Society.
>
> [46] More importantly, the principal Appellant did not provide any evidence to establish any forward-facing fear of persecution in Nigeria based on her status as a parent of the minor Appellant. Consequently, there is insufficient evidence to establish that she would face a serious possibility of persecution, if she returns to Nigeria. Based on the foregoing, I find that the principal Appellant

> does not meet the definition of a Convention refugee or a person in need of protection.

[12] The Applicant submits that the RAD erred by overlooking (i) evidence of future risks at the hands of her family, and (ii) personalized fears of returning with her son.

III. Analysis

[13] The parties agree that these issues raise no exception to the reasonableness presumption established by *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. There, the Supreme Court clarified that decision makers are constrained by their factual and legal context (at para 90). Reasonableness review must therefore balance a respectful deference to specialized administrative decision makers such as RAD members with a robust review (at para 26). This review includes a requirement for responsive reasons, such that decision makers demonstrate that they have actually listened to the parties (emphasis in *Vavilov* at para 127).

A. *The RAD overlooked evidence of forward-looking risk*

[14] The Applicant submits that the RAD erred by overlooking whether the evidence that her in-laws were persistent in their pursuit of her and her son, and were willing to harm others in this pursuit, constitutes a forward-looking risk for her. She submits that the affidavits from her friend, brother and husband provide the following three facts supporting a finding of future risk: (1) her in-laws were willing to beat and detain a person until they provided information about her and her son’s whereabouts; (2) her in-laws were able to enlist police help to question and detain the

friend who provided a hiding place; and (3) her in-laws continued to ask about her and her son's whereabouts.

[15] The Respondent, on the other hand, maintains that the evidence does not indicate the Applicant will be at risk of harm, as she is not a person with any disability; one line from her husband's affidavit – that her family members continue to come looking for her and her son – does not meet the required threshold of evidence to establish risk.

[16] I cannot agree with the Respondent's view. The RAD failed to refer to or acknowledge affidavit evidence that the Applicant's in-laws were willing to use force to detain others to find her son. Moreover, the RAD did not refer to her brother, who deposed in his Affidavit that he was detained and beaten by the Applicant's in-laws in their quest to locate her disabled son.

[17] Contrary to the Respondent's submissions, the presumption that a decision maker has considered all the evidence is rebutted when the reasons ignore contradictory evidence relating to a central issue (*Iduozee v Canada (Citizenship and Immigration)*, 2019 FC 38 at para 29). Clearly, the more important the evidence that is not specifically mentioned and analyzed in the tribunal's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence" (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration*), [1998] FCJ No 1425 at para 17). In the circumstances, the three affidavits contained important evidence.

[18] The Respondent submits that the evidence in the Applicant's brother's Affidavit that her in-laws beat him is untested and speculative. While that could have been one rationale for disbelieving it, or giving no weight to the evidence, the RAD did not provide any such justification. Rather, it provided no rationale on the point.

[19] *Vavilov* is clear that the decision maker must provide reasons and not leave it to the Court to draw the lines between the evidence and the outcome, in that "close attention must be paid to a decision maker's written reasons and that they must be read holistically and contextually, for the very purpose of understanding the basis on which a decision was made" (at para 97). Failure to do so with important contradictory evidence was unreasonable.

B. *The RAD wrongly assessed the Applicant's risk independently from her son*

[20] The Applicant further submits that the RAD erred by considering the claim based on her objective profile as the mother of an autistic child, without considering her personalized fears of the risk to herself in returning to Nigeria with her son. The Applicant relies on *Zheng v Canada (Citizenship and Immigration)*, 2011 FC 181 [*Zheng*] in this regard. In *Zheng*, this Court found that it was unreasonable for the RAD to have assessed the Applicant's risk as though she would return to China without her infant son, who was a Canadian citizen.

[21] The Respondent counters that it was open to the RAD to consider the Applicant's risk independently, i.e. such that her son would remain in Canada as a refugee while she returned to Nigeria, pointing to cases holding that Canadian refugee law does not recognize any fundamental rights for refugee claimants to live together. This includes minors and their parents, according to

the Respondent, who cites *Nazari v Canada (Citizenship and Immigration)*, 2017 FC 561 [*Nazari*] at paras 20 and 29, *Chavez Carrillo v Canada (Citizenship and Immigration)*, 2012 FC 1228 [*Carrillo*] at paras 15 and 17, and *Jawad v Canada (Citizenship and Immigration)*, 2012 FC 1035 [*Jawad*] at para 10. On the other hand, the Respondent argues that *Zheng* was decided on a unique set of facts, including that the child in *Zheng* was a Canadian citizen.

[22] I will observe, as a preliminary point, that each of the four precedent cases cited by the parties – as with all immigration cases – presents a unique set of facts. While I find none of the four cases to be perfectly aligned with the present situation, *Zheng* shares the most similarities. There, the Court found that the RAD erred in finding that Ms. Zheng could simply leave her child in Canada and thus eliminate her risk of forced sterilization.

[23] Like in *Zheng*, the child in this case, as a Convention refugee, now has the ability to remain in Canada (in *Zheng* that right was acquired due to Canadian citizenship by birth). Here, too, the RAD unreasonably presumed that the Applicant (mother) would not face any risk in Nigeria if she returned alone.

[24] In any event, the evidence demonstrated that she would not return alone as she would not abandon her child in Canada without anyone to take care for him, particularly given his developmental delays, which represented the very reason that the two fled Nigeria. Similarly, in *Zheng*, the Court noted that “regardless of the circumstances”, it was unlikely that a mother

would “abandon her infant child in a country where that child has no family to care for him” (*Zheng* at para 32). In short, the two cases are similar, as should be their outcome.

[25] Turning to the three cases cited by the Respondent, *Nazari*, *Carrillo* and *Jawad* were all far more distinguishable and fundamentally differed both in their facts and in the observations of the Court. They all involved situations where the family members were “separable” in their refugee evaluations or, at minimum, other possibilities were feasible.

[26] First, in both *Carillo* and *Jawad*, Justice Noel and the Chief Justice of this Court, respectively, did not recognize any inherent right to family unity within Canadian refugee law. Both pointed out other permanent residency avenues that were open and feasible to the applicants (at para 18 of *Carillo*, and para 10 of *Jawad* – where the persons concerned in any event were wife and husband, not mother and son). It is unclear that any such avenues would be open to this Applicant based on submissions made at the hearing when counsel was asked. However, whether or not the Applicant could successfully apply for permanent residence, the Board still failed to understand the distinction in this case from *Carillo* and *Jawad*, given the inextricable link between the mother and son’s claims present here.

[27] Finally, *Nazari* also fundamentally differed from the present case, in that *Nazari* concerned a country (Iran) where neither the mother, nor son, were deemed to be at risk: in that case, the son had been granted refugee status against Pakistan, but not against Iran, where the Board found that neither the mother nor son would be at risk.

[28] In sum, the Respondent correctly observes – as the Court held in *Nazari*, *Carrillo* and *Jawad* – that there is no absolute right for family members' refugee claims to be processed together and/or to share in the same, positive outcome: harsh as it may be, families may be split up through the refugee determination process. There are certainly claims where siblings or cousins, for instance, do not enjoy the same result, as their factual bases differ.

[29] Here, however, the mother and son were inextricably bound together in their claim. They were threatened together. They hid together. They fled together. They have since been sought out together. Therefore, unlike in *Nazari*, *Carrillo* and *Jawad*, no dividing line can be drawn neatly between their bases of claim.

[30] Finally, turning back to *Vavilov* where this analysis began, respectful deference ends where reasons are unresponsive to the factual and legal context. Here, I find a lack of responsiveness, in that the RAD member does not appear to have listened to the parties. And if she did, her two determinative paragraphs belie that conclusion.

IV. Conclusion

[31] The RAD erred in two respects. First, it did not engage with crucial affidavit evidence for the assessment of future risk. Secondly, it failed to appreciate the evidence of inseparable links between mother and son, upon which she staked her basis of claim. As a result of these two errors, the Decision was unreasonable, and I will send the matter back for redetermination.

JUDGMENT in IMM-3472-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.
2. The matter will be sent back to the Refugee Appeal Division for reconsideration by a different panel.
3. No questions for certification were argued, and I agree none arise.
4. There is no award as to costs.

"Alan S. Diner"
Judge

FEDERAL COURT

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