Federal Court Cour fédérale

Date: 20200304

Docket: IMM-3588-19

Citation: 2020 FC 333

Toronto, Ontario, March 4, 2020

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

UCHE JANE KAWEKWUNE
EMEKE KAWEKWUNE
PRINCESS AWELE KAWEKWUNE

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Ms. Uche Jane Kawekwune (the "Principal Applicant"), her husband, Mr. Emeke Kawekwune, and their daughter Princess Awele Kawekwune (collectively the "Applicants") seek judicial review of a decision of the Immigration and Refugee Board, Refugee Appeal Division (the "RAD") confirming a decision of the Immigration and Refugee Board, Refugee Protection Division (the "RPD"). The RPD found that the Applicants are not Convention

refugees nor persons in need of protection pursuant to section 96 and subsection 97(1), respectively, of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (the "Act").

[2] The Applicants are citizens of Nigeria. They sought protection in Canada because they feared persecution in Nigeria resulting from their perceived support of the deceased homosexual brother of the Principal Applicant and her political opinion opposing the Nigerian statue entitled "*Same-Sex Marriage (Prohibition) Act*."

[3] The RPD rejected the Applicants' claim on the ground that their evidence was not credible. The RAD dismissed their appeal, also on the basis of credibility.

[4] The Applicants argue that the RAD breached the duty of procedural fairness by dismissing the credibility of a letter from a Nigerian lawyer without giving them the opportunity to respond. They also submit that the RAD erred by making other credibility findings upon an issue that had not been addressed by the RPD and rely on the decisions in *Tan v Canada (Minister of Citizenship and Immigration)*, 2016 FC 876 and *Ehondor v Canada (Minister of Citizenship and Immigration*), 2016 FC 1253.

[5] As well, the Applicants argue that the RAD erred in assessing evidence. They allege that the lawyer's letter, an affidavit sworn by the Principal Applicant's father, and an affidavit from their Pastor were unreasonably assessed. They also submit that the RAD erred by impugning their credibility because of inconsistencies between their prior visa applications, thereby rendering an unreasonable decision.

[6] The Applicants also argue that the RAD unreasonably found that the Principal Applicant's lack of protests in Canada against the Nigerian law prohibiting same–sex marriage was a factor undermining her credibility.

[7] The Applicants further submit that the RAD committed a reviewable error by ignoring corroborating evidence, that is the affidavit from the Principal Applicant's uncle.

[8] The Minister of Citizenship and Immigration (the "Respondent") argues that no breach of procedural fairness occurred, that the Applicants seek to challenge the weight given by the RAD to the evidence and that the decision meets the standard of reasonableness.

[9] In the recent decision of *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, the Supreme Court of Canada said that correctness remains the standard of review for issues of procedural fairness and that, presumptively, the standard of reasonableness applies to decisions of administrative decision makers except where legislative intent or the rule of law requires otherwise. Neither exception applies in this case.

[10] The merits of the RAD's decision are reviewable on the standard of reasonableness; see the decision in *Canada (Citizenship and Immigration) v Huruglica*, [2016] 4 F.C.R. 157 (F.C.A).

[11] In *Vavilov*, *supra*, the Supreme Court of Canada confirmed the content of the standard of reasonableness, as set out in *Dunsmuir v New Brunswick*, [2008] 1 S.C.R. 190.

[12] According to the decision in *Dunsmuir*, *supra*, the standard of reasonableness requires that a decision be justifiable, transparent and intelligible, falling within a range of possible, acceptable outcomes that are defensible on the law and the facts.

[13] In my opinion, considering the arguments advanced by the parties and the relevant jurisprudence about the role of the RAD, there was no breach of procedural fairness arising from the failure of the RAD to give notice of its findings of fact.

[14] The powers of the RAD are set out in subsection 111(1) of the Act as follows:

Decision	**Décision**
111 (1) After considering the appeal, the Refugee Appeal Division shall make one of the following decisions:	**111 (1)** La Section d'appel des réfugiés confirme la décision attaquée, casse la décision et y substitue la décision qui aurait dû être rendue ou renvoie, conformément à ses instructions, l'affaire à la Section de la protection des réfugiés.
(a) confirm the determination of the Refugee Protection Division;	
(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.	

[15] In *Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223 at paragraphs 41-47, the Federal Court of Appeal reviewed the scope of the authority of the RAD. At paragraphs 41, 42, and 44, it said the following:

> [41] The legislative purpose behind the RAD's implementation was discussed in *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, [2016] 4 F.C.R. 157 (*Huruglica*). In that case, this Court referred to the 2001 comments of the Minister responsible for Bill C-11, that "[t]he whole purpose [of the RAD] is to ensure that the correct decision is made" (at para. 87), as well as to those of Peter Showler, then Chair of the IRB, who stated that the RAD would "efficiently remedy errors made by the RPD" and act as a "safety net" (at para. 88). After reviewing the legislative history, this Court concluded that "[t]he RAD was essentially viewed as a safety net that would catch all mistakes made by the RPD, be it on the law or the facts" (at para. 98).
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> [42] The RAD has robust powers of error-correction consistent with its statutory purpose. Unless precluded by the IRPA, an appeal to the RAD from an RPD decision may be made as a matter of right by a failed claimant or by the Minister on questions of law, fact or mixed fact and law.
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> …
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> [44] RPD decisions are reviewed by the RAD for correctness (*Huruglica* at para. 103). The RAD may confirm the RPD determination, set it aside and substitute its own decision, including a grant of refugee protection, or refer the matter back to the RPD with directions (IRPA, s. 111(1)). The RAD does not have the power to order removal and makes no orders to that effect. Removal is an administrative action, taken by departmental officers when a claim has been rejected. The Federal Court, on the other hand, can stay or set aside removal orders.
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> …

[16] In my opinion, the procedural fairness argument raised by the Applicants is not persuasive. The RAD enjoys its own fact-finding authority as discussed in *Huruglica*, *supra,* where the Federal Court of Appeal instructed that the RAD is to apply the standard of

correctness to decisions of the RPD except when an issue of the credibility of oral evidence is raised.

[17] The RAD was entitled to make a “new” finding of fact upon an issue that was already in play, that is an issue that was considered by the RPD, the issue about the lawyer’s letter.

[18] As for the other factual findings challenged by the Applicants, I agree with the submissions of the Respondent.

[19] The factual findings made by the RAD were open to it to make, in its exercise of a correctness standard of review.

[20] The factual findings are supported by the evidence and satisfy the requirements of the reasonableness standard as set out in *Dunsmuir*, *supra*: they are justifiable, transparent and intelligible, falling within a range of possible, acceptable outcomes that are defensible on the law and the facts.

[21] In the result, the application for judicial review will be dismissed.

[22] There is no question for certification arising.

JUDGMENT in IMM-3588-19

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

There is no question for certification arising.

"E. Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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