Federal Court  Cour fédérale

Date: 20201026

Dockets: IMM-6993-19

Citation: 2020 FC 1004

Montréal, Quebec, October 26, 2020

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

ADENIYI IDRIS SANUSI
ARINOLA EUNICE SANUSI
ANUOLUWAPO OLUWADARASIMI SANUSI
ADESOLA OLUWATOYOSI SANUSI

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review of a decision of the Immigration and Refugee Board of Canada, Refugee Appeal Division [RAD], confirming the decision of the Refugee Protection Division [RPD], which dismissed the Applicants' claims for refugee protection under section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The Applicants, a couple with two minor daughters, are citizens of Nigeria. On September 10, 2017, they flew to the United States in an attempt to permanently leave their country. While in the United States, the political situation and immigration policies within the country made their life difficult. On November 29, 2017, the Applicants left the United States and travelled to Canada to seek asylum. The couple refuse to subject their daughters to female genital mutilation [FGM] and fear that if they return to Nigeria, members of their extended family would track them down to subject their daughters to FGM.

[3] The RAD reaffirmed the RPD's determination that the Applicants were not Convention Refugees, nor persons in need of protection because they had an internal flight alternative [IFA] in Port Harcourt and that they failed to provide sufficient evidence that relocating to Port Harcourt is unreasonable in their particular circumstances. In this respect, after having reviewed the totality of the evidence, the RAD found that the RPD correctly applied the two-prong test established by the Federal Court of Appeal in *Rasaratnam v Canada (Minister of Employment and Immigration*, [1992] 1 FC 706 [*Rasaratnam*] and *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589.

[4] In his oral submissions before this Court, counsel for the Applicants focuses on the first prong of the test, which he submits is not legally met, that is: the decision-maker must be satisfied, on a balance of probabilities, that there is no serious possibility of the Applicants being persecuted in the part of the country to which it finds an IFA exists (*Rasaratnam* at page 710). Indeed, since this first requirement is not met, Applicants' counsel submits that it is not necessary today for this Court to determine whether the RAD erred with respect to the second

prong of the test, that it is: the conditions in the part of the country considered to be an IFA are such that it would not be unreasonable, in all the circumstances, including those particular to the Applicants, to seek refuge there (*Rasaratnam* at pages 710-711).

[5] The Applicants' argument is a circular one. In particular, during the hearing before the RPD, the Board member asked the Applicants if they could "hide" in Port Harcourt, and in doing so erred in law (Respondent's Record at page 55). In her oral submissions to the RPD, the Applicants' former counsel pointed out that "hiding" was not the correct standard (Respondent's Record at pages 57-58); the Board member promptly clarified his statement by stating that he meant to ask whether the Applicants could "live" in Port Harcourt, not "hide" (Respondent's Record at page 61). Although the RPD has referred to the correct test in its decision, the Board member did not resubmit his question to the Applicants (Respondent's Record at page 61; RPD's decision at page 3). Thus, the RPD breached the Applicants' right to procedural fairness, and thus, the correctness standard applies in this case. While the Applicants also attack the reasonableness of the decision, this breach of procedural fairness suffices to set aside the RAD decision and refer the matter back for redetermination.

[6] In a nutshell, the Respondent replies that the Applicants' experienced former counsel never objected or corrected the RPD during the questioning and never asked the Board member to restate the question and formally ask whether the Applicants could "live" safely in Port Harcourt, rather than "hide" in Port Harcourt. It is clear that the Applicants had full opportunity to testify on their fear of persecution in Port Harcourt, and whether it was reasonable for them to live in Port Harcourt. Therefore, it is now too late to raise before this Court the issue of

procedural fairness, and indeed when read as a whole, the RAD's decision to confirm the RPD's decision is supported by the evidence and reasonable in all respects.

[7] I agree with the Respondent. Issues of procedural fairness must be raised at the earliest opportunity and a failure to do so amounts to an implied waiver of any perceived breach of procedural fairness (see *Kamara v Canada (Minister of Citizenship and Immigration)*, 2007 FC 448 at para 26; *Sayeed v Canada (Citizenship and Immigration)*, 2008 FC 567 at para 23; *Duversin v Canada (Citizenship and Immigration)*, 2018 FC 466 at para 26; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22-26).

[8] The comment made by the Board member during questioning about "hiding" was duly examined by the RAD who reviewed the entire record, including the audio recording of the hearing before the RPD. In the end, the Applicants failed to convince the RAD that the RPD erred in law, considering that in the RPD decision the correct test is applied, and further considering the clarification given by the Board member at the hearing. The alleged breach of procedural fairness is a new argument. Therefore, the Applicants could and should have raised the issue of procedural fairness, and asked that the question be specifically reformulated and put by the Board member to the Applicants. That would have allowed the RPD to consider any such answer. The RAD did not breach procedural fairness either. Indeed, before the RAD, the Applicants did not make any meaningful argument that they were prevented of presenting evidence at the hearing before the RPD, or that the RAD should convoke a hearing and allow the Applicants to present further testimony on the issue of IFA (see paragraphs 110(4) and (6) of the IRPA).

[9] I have also considered the other grounds of review raised by the Applicants in their written pleadings (which were not reargued orally to this Court by Applicants' counsel). Same are all unfounded and dismissed accordingly. I basically endorse the arguments for rejection made by the Respondent's counsel in their written submissions.

[10] When read as a whole, the RAD's decision is supported by the evidence and reasonable in all respects. Specifically, the Applicants were unable to provide any details about who was threatening them. When asked about how they would be located in Port Harcourt, the Applicants insisted it would be because of social media. The RPD concluded that any social media presence they have can be controlled by them and this finding was not contested in appeal. The documentary evidence also shows that whether or not the minor Applicants undergo FGM is up to the parents, and both parents in this case are against this practice. With respect to the particular circumstances of the Applicants, they speak Yoruba, but also English which is largely spoken in Port Harcourt. They are committed Christians; indeed, Christianity is the majority religion in the Niger Delta where Port Harcourt is located. The parents are both well-educated with post-secondary education and a lengthy work history in Nigeria. I fail to see any reviewable error in the way the RAD conducted its assessment of this relevant evidence, as it was also within the RAD's purview to assess the probative value, the relevancy or the sufficiency to be given to the documentary evidence, to the Jurisprudential Guide, and exhibit C-18 on which the Applicants' arguments rest.

[11] This Court dismisses the present application for judicial review. There is no question of general importance raised in this case.

JUDGMENT in IMM-6993-19

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

No question is certified.

"Luc Martineau"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	ADENIYI IDRIS SANUSI, ARINOLA EUNICE SANUSI, ANUOLUWAPO OLUWADARASIMI SANUSI, ADESOLA OLUWATOYOSI SANUSI v MINISTER OF CITIZENSHIP AND IMMIGRATION
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