Federal Court  Cour fédérale

Date: 20210702

Docket: IMM-620-20

Citation: 2021 FC 703

Ottawa, Ontario, July 2, 2021

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

SMART AGHADUEKI
AUGUSTA OMON AGHADUEKI
OSAWUESE BERNICE AGHADUEKI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a negative pre-removal risk assessment decision of a Senior Immigration Officer [the "Officer"], dated December 27, 2019 [the "Decision"], pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the "*Act*"].

II. Background

[2] The Principal Applicant, Smart Aghadueki, his wife and daughter [the "Applicants"] are citizens of Nigeria. They applied for a pre-removal risk assessment in 2019.

[3] The Applicants sought protection in Canada on various grounds, including: (1) fear of persecution due to religion – Christianity; (2) the Fulani herdsmen crisis – the Applicants would be directly affected by the violence of the Fulani militants; (3) widespread insecurity in Nigeria, including killings and kidnapping; (4) yellow fever outbreaks as well as other diseases; (5) fear that the Applicants would be tortured, detained and subjected to inhumane and degrading treatment on the basis of Nigerian authorities becoming aware of their failed refugee claims; and (6) gender-based violence in Nigeria.

[4] The pre-removal risk assessment applications were rejected by the Officer in a Decision, dated December 27, 2019. The Applicants seek an Order setting aside the Decision and remitting the matter for reconsideration by a different immigration officer.

III. Decision Under Review

[5] The Officer found that the Applicants had failed to meet the requirements of sections 96 and 97 of the *Act*. The alleged risks related to religion, the Fulani militants and gender-based violence were not new risks, pursuant to subsection 113(a) of the *Act*, and the Applicants had failed to provide a reasonable explanation as to why these alleged risks were not brought up at the Refugee Protection Division hearing.

[6] As it relates to the Applicants' concerns regarding returning to Nigeria as failed refugees, the Officer reviewed the evidence in question, finding that the articles lacked relevance or otherwise did not speak to the risks as alleged by the Applicants. The general instability of Nigeria and risk of yellow fever was further not established by the Applicants in a "personal forward-looking way".

IV. Issues

[7] The issues are:

A. Did the Officer err in not conducting an oral hearing or for failing to provide reasons for not conducting an oral hearing?

B. Was the Decision unreasonable:

i. In the Officer's assessment of new evidence?

ii. For failing to consider the evidence?

V. Standard of Review

[8] The Applicants argue that the Officer's selection to not proceed with an oral hearing is reviewable on the standard of correctness. However, they acknowledge a diverging line of case law, where this Court has also applied the standard of reasonableness to the issue of whether an oral hearing is required as part of a pre-removal risk assessment (*Zmari v Canada (Citizenship*

and Immigration), 2016 FC 132 at para 10 [*Zmari*]). This is because the assessment of whether an oral hearing is warranted results from an application of subsection 113(b) of the *Act* and section 167 of the of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the "*Regulations*"], engaging a question of mixed law and fact (*Zmari*, above at para 12).

[9] This said, in *Zmari*, the Federal Court found that the question of whether a hearing was required was properly a question of procedural fairness, engaging the standard of correctness (*Zmari* at para 13, citing *Mission Institution v Khela*, 2014 SCC 24 at para 79).

[10] I note that the authorities relied on by the Applicants, including from the Supreme Court of Canada, pre-date *Vavilov* (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). Nonetheless, I find that the application of either standard does not change the result in this case.

[11] The issue of whether the Decision was unreasonable is reviewable on the standard of reasonableness (*Vavilov*, above at para 17; *Demesa v Canada (Citizenship and Immigration)*, 2020 FC 135 at paras 9-10).

VI. Analysis

A. *Did the Officer err in not conducting an oral hearing or for failing to provide reasons for not conducting an oral hearing?*

[12] The Applicants argue that the Officer made a veiled credibility finding and therefore breached the Applicants' right to procedural fairness by finding that an oral hearing was not required and by failing to provide any reasons as to why an oral hearing was not necessary.

[13] It is the Respondent's position that the Applicants did not meet the requirements of section 167 of the *Regulations*. There were no credibility concerns. Further, the Officer had found that the Applicants had not established any new risks. It was self-evident that the prescribed factors had not been met. Accordingly, there was no basis to convoke a hearing.

[14] Section 167 of the *Regulations* provides:

Hearing — prescribed factors	**Facteurs pour la tenue d'une audience**
167 For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:	**167** Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :
(a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	**a)** l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;
(b) whether the evidence is central to the decision with respect to the application for protection; and	**b)** l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(c) whether the evidence, if accepted, would justify allowing the application for protection.	**c)** la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

[15] An oral hearing is not available to the Applicants as of right. This determination of an officer is an exercise of discretion, based on the factors outlined in section 167 of the *Regulations* and subsection 113(b) of the *Act*:

Consideration of application	**Examen de la demande**
113 Consideration of an application for protection shall be as follows:	**113** Il est disposé de la demande comme il suit :
(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;	**b)** une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;

[16] The requirements under section 167 of the *Regulations* are conjunctive, "therefore, an oral hearing is generally required if there is a credibility issue regarding evidence that is central to the decision and which, if accepted, would justify allowing the application" (*Strachn v Canada (Citizenship and Immigration)*, 2012 FC 984 at para 34). Where there is compliance with all three subsections of 167 of the *Regulations*, an oral hearing *may* be required, pursuant to subsection 113(b) of the *Act* (*Cromhout v Canada (Citizenship and Immigration)*, 2009 FC 1174 at paras 36-37).

[17] The Applicants did specifically request an oral hearing at paragraph 45 of their pre-removal risk assessment application submissions. However, I do not find that credibility was in issue, either expressly or in a veiled manner, and the requirement of subsection 167(a) was not met.

[18] The Officer clearly assessed all six grounds raised by the Applicants. As it relates to the risks alleged on the basis of religion, the Fulani militants and gender-based violence, the Officer determined that these were not new risks, as required under subsection 113(a) of the *Act*. As it relates to the alleged concerns of the Applicants regarding the risks of their failed refugee status in Nigeria, the Officer found that there was insufficient evidence to establish the requirements of section 96 or 97 of the *Act*. The Applicants had further failed to establish that the general instability of Nigeria and the risk of yellow fever would impact the Applicants in a personal forward-looking way. The Officer has not called into question the Applicants' credibility either expressly or when reviewing the basis of the Decision.

[19] The Officer's reasons indicate that the requirements of section 167 of the *Regulations* are not met, as such any presumption to an oral hearing fails to be triggered under subsection 113(b) of the *Act*. The Officer was not required to provide reasons in response to the Applicants' explicit request, as credibility was not in issue in the Officer's determination. These circumstances are distinguishable from those cases relied on by the Applicants (*Montesinos Hildalgo v Canada (Citizenship and Immigration)*, 2011 FC 1334 at paras 20-21; *Zemo v Canada (Citizenship and Immigration)*, 2010 FC 800 at para 18).

B. *Was the Decision unreasonable?*

[20] The Applicants posit that the Officer failed to appropriately consider the new risks they raised, which were not previously before the Refugee Protection Division. The Applicants further submit that the Officer failed to consider evidence in evaluating the risks faced by the Applicants – as Christians engaged in farming, the Applicants state that they are personally at risk of attack by Fulani militants and that there is no state protection or internal flight alternative.

[21] A pre-removal risk assessment officer must show deference to the decision of the Refugee Protection Division. A pre-removal risk assessment is meant to be "an assessment of risk based on new facts or evidence" (*Tran v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 175 at para 12; *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at para 12 [*Raza*]). The authority of such an officer is limited by subsection 113(a) of the *Act* and the requirement for new evidence:

Consideration of application	**Examen de la demande**
113 Consideration of an application for protection shall be as follows:	**113** Il est disposé de la demande comme il suit :
(a) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;	**a)** le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;

[22] The Federal Court of Appeal has outlined the questions a pre-removal risk assessment officer may consider about the proposed new evidence, under subsection 113(a) of the *Act*. As it relates to the "newness" of the proposed new evidence, the Federal Court of Appeal has stated (*Raza*, above at para 13):

> 3. Newness: Is the evidence new in the sense that it is capable of:
>
> i. proving the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing in the RPD, or
>
> ii. proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or
>
> iii. contradicting a finding of fact by the RPD (including a credibility finding)?
>
> If not, the evidence need not be considered.

[23] Evidence may be excluded on the ground that it fails to meet the "newness" requirement (*Raza* at para 15). The Applicants have not provided a reasonable explanation for why some of the evidence that existed before the Refugee Protection Division hearing was not presented at the hearing. The Officer found:

> … The applicants have not submitted sufficient reasons as to why these risks were not brought up during their RPD hearings. The information regarding these risks was clearly available. I have reviewed Human Rights Watch World Reports from 2017 and 2019, there does not appear to be a significant change that would warrant their consideration as a new risk. These risks existed prior to the RPD hearing, where the applicants failed to bring the risks up, the applicants do not provide a reasonable explanation as for why these risks were not brought up during their RPD hearing, and objective country condition reports show these risks have not substantially changed. Therefore, I find these are not new risks.

[24] I have not been directed to any evidence or submissions that suggest otherwise. The Applicants' selective view of the documentary evidence is not supported on a contextual reading of that evidence. I further note the Respondent's argument that a pre-removal risk assessment is not an appropriate avenue for case splitting. Although in relation to subsection 110(4) of the *Act*, the Federal Court of Appeal has found, after noting the similarities between subsections 110(4) and 113(a) of the *Act* that (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 50):

> [50] As the Supreme Court noted in Palmer, a well-established judicial principle exists whereby the evidence and issues must be introduced exhaustively and dealt with at trial in criminal matters or at first instance in civil matters. As a case progresses, the issues in the matter must normally be further narrowed; the effect of introducing new evidence would be rather to expand the scope of the debate. This is what the RAD aptly highlighted at paragraph 20 of its reasons:
>
> > On this topic, it should be noted that the fact that evidence corroborates facts, contradicts RPD findings or clarifies evidence before the RPD does not make it "new evidence" within the meaning of subsection 110(4) of the Act. If that were the case, refugee protection claimants could split their evidence and present evidence before the RAD at the appeal stage that could have been presented at the start, before the RPD. In my opinion, this is exactly what subsection 110(4) of the Act seeks to prohibit.

[25] For similar reasons, I find that it has not been demonstrated that the Officer ignored any relevant evidence.

VII. Conclusion

[26] For the reasons above, this Application is dismissed.

[27] There is no question for certification.

VIII. Appendix A – Relevant Provisions

[28] Sections 96 and 97 of the *Act* provide:

Convention refugee	**Définition de réfugié**
96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	**a)** soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	**b)** soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
Person in need of protection	

97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

Person in need of protection

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

Personne à protéger

97 (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Personne à protéger

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

[29] Further, subsection 113(a)-(b) of the *Act* provides:

Consideration of application

113 Consideration of an application for protection shall be as follows:

(a) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;

(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;

Examen de la demande

113 Il est disposé de la demande comme il suit :

a) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;

b) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;

[30] Section 167 of the *Regulations* states:

Hearing — prescribed factors

167 For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:

(a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;

(b) whether the evidence is central to the decision with respect to the application for protection; and

(c) whether the evidence, if accepted, would justify allowing the application for protection.

Facteurs pour la tenue d'une audience

167 Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :

a) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;

b) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;

c) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

JUDGMENT in IMM-620-20

THIS COURT'S JUDGMENT is that:

1. This Application is dismissed; and

2. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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