Federal Court  Cour fédérale

Date: 20191213

Docket: IMM-6592-18

Citation: 2019 FC 1602

Ottawa, Ontario, December 13, 2019

PRESENT: Mr. Justice Norris

BETWEEN:

OLAJUMOKE FOLASADE ODEDELE
ANUOLUWAPO MELODY ODEDELE
OREOLUWA HARMONY ODEDELE
AYOTOMIWA DAVID ODEDELE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Olajumoke Folasade Odedele (the principal applicant) and her three children are citizens of Nigeria. Ajibola Kehinde Odedele, Ms. Odedele's husband and the father of the children, is also a citizen of Nigeria. Ms. Odedele says she fears returning to Nigeria because her daughters Anuoluwapo Melody Odedele (born in 2001) and Oreoluwa Harmony Odedele (born in 2003) will be forced to undergo female genital mutilation [FGM], a practice said to be customary on

the paternal side of the family but which both parents oppose. (The fourth applicant is a son who was born in 2005). Ms. Odedele claims that at a birthday party for Mr. Odedele in Port Harcourt in October 2016, members of his family confronted him and blamed him for tragedies that had befallen the family. They insisted that the minor daughters be subjected to FGM. There was a physical altercation and the police got involved.

[2] The applicants left Nigeria for the United States in December 2017, having previously obtained visitor visas for that country. After being in the United States less than two weeks, the applicants made their way to the Canada/US border on Roxham Road and claimed refugee protection. Mr. Odedele remained in Nigeria and followed a short time later, travelling to the US in January 2018 (although he returned to Nigeria in June 2018).

[3] The claims for refugee protection were heard by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] on July 11, 2018. For reasons dated August 8, 2018, the claims were rejected on the basis that the minor female applicants were not at risk of persecution and, in any event, the applicants had an Internal Flight Alternative [IFA] in Abuja, Lagos or Benin City.

[4] The applicants appealed this decision to the Refugee Appeal Division [RAD] of the IRB. For reasons dated December 11, 2018, the RAD dismissed the appeal and confirmed the decision of the RPD, finding that the RPD had correctly determined that the applicants had an IFA in Lagos.

[5] The applicants now seek judicial review of the RAD's decision under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. They submit that the RAD erred in refusing to admit new evidence and that its determination that they had an IFA in Lagos is unreasonable.

[6] For the reasons set out below, I do not agree. As a result, the application will be dismissed.

[7] There is no dispute concerning the legal principles governing this application. The RAD's determinations of factual issues and issues of mixed fact and law are reviewed on a reasonableness standard (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35). This includes, among other things, the RAD's assessment of the admissibility of new evidence (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 29 [*Singh*]) and the RAD's determination as to the availability of an IFA (*Tariq v Canada (Citizenship and Immigration)*, 2017 FC 1017 at para 14).

[8] Reasonableness review "is concerned with the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome" (*Canada (Attorney General) v Igloo Vikski Inc*, 2016 SCC 38 at para 18). That is to say, the reviewing court must look at both the outcome and the reasons that are given for that outcome (*Delta Air Lines Inc v Lukács*, 2018 SCC 2 at para 27). The reviewing court examines the decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determines "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of

the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]). These criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). The reviewing court should intervene only if these criteria are not met. It is not the role of the reviewing court to reweigh the evidence or to substitute its own view of a preferable outcome (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61).

[9] Looking first at the admissibility of the new evidence, in support of their appeal to the RAD the applicants tendered an affidavit from Ms. Odedele to which was attached as an exhibit a letter dated September 13, 2018, from a solicitor in Nigeria. The letter is headed "Legal Opinion in Support of RAD Appeal." Ms. Odedele's affidavit stated only that the letter "is a legal opinion from my lawyers in Nigeria referencing the unreasonableness of the IFA locations mentioned by the panel."

[10] The admissibility of new evidence on an appeal to the RAD is governed by subsection 110(4) of the *IRPA*. This provision states:

110(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the	110(4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au

rejection. moment du rejet.

[11] As the Federal Court of Appeal explained in *Singh*, the existence of criteria governing the admissibility of new evidence on appeal helps to preserve the integrity of the judicial process by promoting finality with respect to the factual record at the first level of decision-making (with very limited exceptions) and encouraging the narrowing of issues as matters move up the appellate ladder (*Singh* at paras 43 and 50).

[12] Subsection 3(3)(g)(iii) of the *Refugee Appeal Division Rules*, SOR/2012-257, requires an appellant to include "full and detailed submissions" in their memorandum regarding how any documentary evidence the appellant wishes to rely upon "meets the requirements of subsection 110(4) of the Act and how that evidence relates to the appellant." Despite this, the applicants' memorandum of argument filed at the RAD is silent about the admissibility of the September 13, 2018, letter.

[13] The RAD member determined that the letter is inadmissible, finding that "this evidence was reasonably available prior to the rejection of the claim." The applicants contend that the RAD member erred because the letter "was necessitated as a result of the decision of the RPD," that it "is not based on any event that occurred prior to or subsequent to the RPD," and that it is an opinion on the prevalence of FGM in Nigeria and "the indication that there is no Internal Flight Alternative for victims of such threat." There is no merit to this argument. The applicants offered no information concerning when the solicitor was retained to provide this opinion. While the letter itself post-dates the RPD's decision, its contents clearly relate to matters that pre-date the RPD hearing. For example, the author claims to relate first-hand knowledge of the

events at Mr. Odedele's birthday party in October 2016. It is also noteworthy that the author of the letter ventures well beyond anything remotely resembling a "legal opinion" by asserting, among other things, that the applicants will be fearful of Mr. Odedele's family no matter where they live in Nigeria ("they would always be forced to look over their shoulders in fear because of their experience in the hands of member's of her husband's family") and that the alleged agents of persecution "are hell bent to have their way and they would stop at nothing to achieve their objectives and that is to force FGM on our client's daughters." In the absence of any indication to the contrary, if these "opinions" have any foundation at all, they are presumably based on events that occurred before the applicants left Nigeria.

[14] The applicants knew that IFA was an issue before the RPD. To secure the admission of the "legal opinion" on appeal, it was therefore incumbent upon them to demonstrate to the RAD that, among other things, it was not reasonably available at the time of the RPD hearing. The applicants did not even try to do so. The RAD's determination that the letter is not admissible under subsection 110(4) of the *IRPA* is altogether reasonable.

[15] The applicants also contend that the RAD's determination that they had an IFA in Lagos is unreasonable. I do not agree. The member stated the appropriate test for an IFA, applied it to the evidence in the record, and reached an independent determination upholding the RPD's findings. The member considered and addressed the submissions advanced on appeal. To the extent that the applicants' submissions on this application for judicial review engage with the merits of the RAD's decision, their objections are simply invitations to this Court to reweigh the evidence and reach a different conclusion (for example, concerning the significance of the

distance between Lagos, the proposed IFA, and Ibadan, where the alleged agents of persecution live). As set out above, that is not this Court's role on judicial review. Further, contrary to the applicants' contention, the member did not fail to consider the independent claims of the minor female children. Those claims were the sole basis of the claim for refugee protection and, as such, were fully considered.

[16] The RAD's decision is justified, transparent and intelligible, and it clearly falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and law. It is a reasonable decision within the terms of *Dunsmuir*. No basis has been shown for this Court to intervene.

[17] I would add one final note. In disposing of the appeal, the RAD member relied on the IRB Jurisprudential Guide for Nigeria. This Jurisprudential Guide (and others) was challenged by the Canadian Association of Refugee Lawyers in a judicial review application ultimately heard by the Chief Justice on June 6, 2019. In their Memorandum of Argument in support of their application for leave (dated January 22, 2018 [*sic* 2019]), the applicants noted that they relied on the applicant's argument in the CARL matter. The applicants also stated that, should they be granted leave to proceed with their application for judicial review, they would seek to consolidate their application with the CARL matter. While the applicants were obviously granted leave to proceed with this application for judicial review (on May 2, 2019), they never sought to join the *CARL* proceeding. In any event, the CARL application for judicial review has now been decided: see *Canadian Association of Refugee Lawyers v Canada (Citizenship and Immigration)*, 2019 FC 1126 (released September 4, 2019) [*CARL*]. Given the Chief Justice's

conclusions regarding the Jurisprudential Guide for Nigeria, that case does not assist the applicants (see *CARL* at para 119).

[18] The parties have not suggested any questions of general importance for certification under subsection 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-6592-18

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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