Federal Court  Cour fédérale

Date: 20161115

Docket: IMM-1117-16

Citation: 2016 FC 1274

Ottawa, Ontario, November 15, 2016

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

JAMES ADENIYI TELUWO
TENIADE DEBORAH TELUWO

Applicants

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], of a February 23, 2016 decision of the Refugee Appeal Division [RAD] determining that the Applicants are not Convention Refugees or persons in need of protection.

[2] The Applicants argue that the RAD breached procedural fairness by deciding the appeal on a new issue, that it erred by unreasonably assuming that the Applicants would leave their daughter in Canada and return to Nigeria, and that it contravened the principle of non-refoulement.

[3] The Respondent has submitted a motion to dismiss the application for judicial review on the basis of mootness.

[4] The application is dismissed on the ground of mootness. The risks claimed by the Applicants have become speculative and other, arguably more suitable forums, remain available to make an application for permanent residence, should these risks arise in the future.

I. Background

[5] The facts are not at issue in this case as the Refugee Protection Division's [RPD] factual findings are agreed upon. The Applicants are citizens of Nigeria. They came to Canada with their daughter on May 30, 2015. The Applicants never intended to stay in Canada permanently. On May 31, 2015, their daughter was rushed to the hospital and diagnosed with end stage renal disease. They were unaware of this condition before their departure from Nigeria, as she had been previously misdiagnosed.

[6] The daughter, who is eight years old and their only child, requires chronic hemodialysis treatment [the treatment] and, ultimately, a kidney transplant to survive. While the treatment is available in Nigeria, due to economic considerations it is only provided for older children. The

youngest child to undergo the treatment in Nigeria was 10 years old. Kidney transplantation for children is currently not available in Nigeria and the youngest transplant patient was 17 years old. Without the treatment, the Applicants' daughter would die in a short time upon returning to Nigeria.

[7] The Applicants and their daughter applied for refugee status on this basis. The RPD decided, on December 7, 2015, that the Applicants and their daughter were Convention refugees and persons in need of protection. The Respondent appealed to the RAD. In a February 23, 2016 decision, the RAD partially allowed the appeal confirming that the daughter was a Convention Refugee but setting aside the determination that she was a minor in need of protection and finding that the Applicants are neither Convention refugees nor persons in need of protection.

[8] On June 14, 2016, the Minister issued the Applicants Temporary Resident Permits [TRPs] and work permits, valid for three years.

II. The Impugned Decision

[9] The RAD confirmed the RPD's finding that the Applicants' daughter is a Convention Refugee as, although Nigeria has the capacity and ability to provide the life-saving treatment she requires, this treatment will not be provided to her because of her age. This unwillingness to provide treatment on the basis of an immutable characteristic was found to be persecutory. This finding is not challenged.

[10] The RAD reversed the RPD's finding and found that the Applicants' daughter was not a person in need of protection. The RAD found that the facts of this case fell within the exclusion set out at Section 97(1) of the Act, as Nigeria is unwilling to provide her with the medical care she requires because of economic considerations. This finding is not challenged.

[11] The subject matter of this application for judicial review is the RAD's finding that the Applicants are neither Convention Refugees nor persons in need of protection. The RAD first noted that neither party had provided persuasive argument on the issue of the Applicants' independent claim (as separate from the daughter's) and that the RPD did not provide sufficient reasons to support its conclusions on this question. The RAD concluded that the Applicants were not Convention Refugees as it found "the risk of persecution faced by the minor Respondent does not extend to them and that they can return to Nigeria." The RAD also concluded that the Applicants' risk of harm is based on their daughter's risk of harm in Nigeria and that, having found that their daughter is a Convention Refugee, the Applicants will not suffer the cruel and unusual treatment or punishment of watching their child die. In conclusion on this point the RAD stated:

> The RAD finds that while it may be difficult for the adult Appellants to return to Nigeria while the minor Respondent remains in Canada and receives treatment, this does not rise to a level of cruel and unusual treatment or punishment. While it is true that there may be other options available to the adult Respondents that would allow them to remain in Canada with their daughter, the RAD is limited in its jurisdiction to its findings with respect to sections 96 and 97 of the IRPA.

III. Issues

[12] This application raises the following issues:

1. Should the application be dismissed on grounds of mootness?
2. Did the RAD breach procedural fairness by deciding the appeal on a new issue?
3. Did the RAD err by unreasonably assuming that the Applicants would leave their daughter in Canada and return to Nigeria?
4. Did the RAD contravene the principle of non-refoulement?

[13] As the preliminary question of mootness warrants the dismissal of this application, my analysis will limit itself to this first issue.

IV. Analysis

[14] The Respondent has filed a motion to dismiss the judicial review on grounds that the issue has become moot as the Applicants have been granted TRPs and work permits valid for three years.

[15] The test for mootness is well-established. First the Court must consider whether a decision would have any practical effect on solving a live controversy between the parties. The Court should consider whether the issues have become academic, and whether the dispute has disappeared, in which case the proceedings are moot. If this first step is met, the Court may decide to hear the matter if, notwithstanding the fact that the matter is moot, it should nonetheless exercise its discretion to decide the case. This will be guided by three policy rationales: 1) the presence of an adversarial context; 2) the concern for judicial economy; and 3) the consideration of whether the Court would be encroaching upon the legislative sphere rather than fulfilling its role as the adjudicative branch of government see *Harvan v Canada*

(Ctizenship and Immigration), 2015 FC 1026 at para 7; *Borowoski v Canada (Attorney General)*, [1989] 1 SCR 342 at paras 15-17, 29-40.

[16] The Respondent submits that the Applicants' sole basis for a claim for protection has expired as they can now remain in Canada until their daughter is old enough to receive care in Nigeria. Furthermore, the Court should not exercise its discretion to decide on this matter as there is no longer an adversarial context and scarce judicial resources should not be expended solely to adjudicate on the reasonableness of the RAD's reasons when the requested remedy has been granted. With the issuance of TRPs, any risk caused to the Applicants by eventual separation from their daughter is, at this point, purely speculative. In addition, should the Respondents wish to seek permanent residence, nothing precludes them from submitting an application on humanitarian and compassionate [H&C] grounds, a forum more appropriate for considering the best interests of the child.

[17] The Applicants submit that there is a live issue before the Court. They argue that the first stage of the mootness test is not met as the temporary status granted does not resolve the controversy with regard to the RAD decision. This decision is challenged as the Applicants seek to be recognized as Convention Refugees in order to be able to remain with their daughter for the duration of her treatment, which may extend well beyond three years. The issuance of TRPs does not resolve this issue as TRPs are temporary in nature, can be withdrawn at any point, may be invalidated if the holder leaves Canada, and do not have any guarantee of renewal. The Respondents argue that these arguments with regards to TRPs are purely speculative. The Applicants further argue that the issuance of TRPs or the speculative prospect of a successful

application on H&C grounds is irrelevant to this proceeding. Should the Court decide the issue is moot, the Applicants submit that the Court should exercise its discretion to hear the issue as the RAD's decision to introduce and decide a new issue without notice would be left standing if unchallenged.

[18] In order to decide on the question of mootness, the Court is first required to consider scenarios pertaining to the application to set aside the RAD decision, in order to determine if any live controversy remains.

[19] The RAD, after upholding the daughter's claim, proceeded to reject the position that her situation of risk was intertwined with or extended to her parents' situation. It found that the parents do not have a well-founded fear of persecution upon return to Nigeria and that, while it may be difficult for them to return to Nigeria while their daughter remains in Canada for treatment, this does not arise to the level of cruel and unusual treatment or punishment. The RAD concluded that the parent's right to remain in Canada would have to be considered as an H&C application under section 25 of the Act.

[20] The Applicants submit that the RAD has breached their right to procedural fairness by raising the new issue of the Applicants' independent claim for protection and the scenario of family separation without notice. Neither party argued before the RAD that the RPD had erred in finding that the Applicants' claims and their daughter's claim were inextricably linked. The issue of the Applicants' independent claim was never contemplated by the Applicants, the Respondent,

or the RPD and no evidence or submissions where filed by either party on this question prior to the RAD's decision.

[21] In being denied the opportunity to respond to this new issue, the Applicants claim they were prevented from leading evidence that would demonstrate that their being returned to Nigeria would endanger their daughter's medical treatment. The RPD agreed that the lack of parental support would be detrimental to the daughter's treatment (see paragraph 47 of the RPD's decision).

[22] The Court is in agreement with the Applicants that the RAD breached procedural fairness by raising and considering an issue not argued by the parties without first giving them notice of the issue and an opportunity to make submissions on the point. However, the Court must be convinced that, should the matter be returned to the RAD for a new hearing, a live controversy remains. The newly issued three-year TRPs allowing the parents to remain in Canada must be considered in this determination.

[23] The Applicants have always alleged and continue to argue that their risk is tied to their daughter's. They argue that they would face cruel and unusual punishment or treatment by their being returned to Nigeria while leaving their daughter in Canada for treatment. I find it difficult to imagine that family separation alone would arise to this level.

[24] They also argue that their daughter's medical treatment would be adversely affected should they be forced to return to Nigeria. While a novel argument, I think it could be advanced

if the evidence demonstrated a causal relationship such that the daughter's risk would be intertwined with the parent's remaining in Canada. The Applicants have indicated that they will lead expert medical evidence to follow up the RPD's finding to this effect. This provides a further argument that the RAD decision should be set aside in order for them to be able to pursue their statutory right to lead this evidence under section 110(4) of the Act.

[25] The issue then arises as to the effect of the three-year TRPs on these arguments. In the Court's view, the delay of the Applicants' removal by at least three years renders their risk argument speculative. I am satisfied that expert evidence could not reasonably opine, at this time, on circumstances of risk to the daughter were the parents to return to Nigeria in three years time, or to events that could arise in the next three years. The present situation is subject to change: the daughter's treatment could become available in Nigeria or further TRPs could be issued. At the moment, an analysis of the Applicants' prospective risk is speculative.

[26] Moreover, if the motion to dismiss the application on grounds of mootness was granted, there would not be any loss of rights to the parents upon a future eventual notice of removal. They would be open to bring applications to obtain permanent resident status by means of both a pre-removal risk assessment [PRRA] and an H&C application, preferably both at the same time, resulting in some judicial economy. They could advance all the same arguments they would submit if this matter was sent back to the RAD, with the important difference of these no longer being speculative.

[27] The other reality is that the Applicants have a viable H&C claim for permanent residence based on the best interest of the child, which will only be strengthened by their establishment in Canada over time. On this point, I again agree with the Respondent that the statutory scheme is such that a claim in the nature of parents being forced to leave with a child remaining in Canada is a matter normally to be considered by way of an H&C application and not a section 97 risk application.

[28] Dismissing this application as moot would not have the effect of engaging the one year bar pursuant to sections 25 (H&C) and 112 (PRRA) preventing subsequent applications. Once the one year period following this decision expires, that issue would not even arise. These reasons make it plain that the intention of the Court is not to uphold the RAD's decision, but only to terminate the application for mootness, on the understanding that the Applicants would be able to bring a PRRA or H&C application if facing a removal order in the future.

[29] As such, the Court finds that the issues before it have become moot. Furthermore, the Court should not exercise its discretion to hear the issue as judicial economy does not favour granting an application for judicial review and sending a matter back to an administrative decision maker for reconsideration where there are significant concerns that it may not be successful or necessary given the speculative nature of the rights involved.

[30] Accordingly, the application is dismissed on grounds of mootness. The parties agreed that there is no question to be certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed and no question is certified for appeal.

"Peter Annis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1117-16
STYLE OF CAUSE:	JAMES ADENIYI TELUWO AND TENIADE DEBORAH TELUWO v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 22, 2016
JUDGMENT AND REASONS:	ANNIS J.
DATED:	NOVEMBER 15, 2016

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