Federal Court  Cour fédérale

Date: 20170105

Docket: IMM-2141-16

Citation: 2017 FC 14

Ottawa, Ontario, January 5, 2017

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

ABOAJILA ABDULMAULA
AMINA ABOHARBA
YAKHIN ABDULMAULA
MOHAMED ABDULMAWLA
IBRAHIM ABDULMOULA
ALA ABDELMOLA
MAHAMOUD ABDULMOULA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants, Aboajila Abdulmaula, his wife, Amina Aboharba, and their five minor children, have sought judicial review of a decision of the Refugee Appeal Division [RAD] of the

Immigration and Refugee Board [IRB]. The RAD dismissed the Applicants' appeal of a decision of the Refugee Protection Division [RPD] of the IRB, and confirmed that the Applicants are neither Convention refugees nor persons in need of protection pursuant to ss 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[1] For the reasons that follow, I have concluded that the RAD reasonably refused the Applicants' request to adduce the 2015 report of the United Nations High Commissioner for Refugees [UNHCR] as new evidence. The Applicants' argument that the 2015 UNHCR report should be "deemed" a part of the record was not raised before the RAD, and cannot therefore be advanced for the first time in this application for judicial review. The RAD's conclusion that the Applicants had a viable Internal Flight Alternative [IFA] in Tobruk, Libya was reasonable. The application is therefore dismissed.

II. Background

[2] The Applicants are citizens of Libya. Mr. Abdulmaula was designated the Principal Applicant by the RPD under Rule 55 of the *Refugee Protection Division Rules*, SOR/2012-256.

[3] Mr. Abdulmaula was a professor of banking and finance at the University of Tripoli and the University of Zawia. In support of his refugee claim, he said that from 2011 onwards, he tried to persuade young people to "give up their weapons", to "stay away from militias," and to continue their studies or assist in strengthening the country. In 2012, he was allegedly detained by the Al Farouq Brigades, an armed rebel organization, on three occasions and told to cease these activities.

[4] Mr. Abdulmaula arrived in Canada on February 18, 2013 on a study visa. The remaining Applicants joined him on April 6, 2013. The Applicants sought refugee status in April 2015. The RPD heard their claims on June 23, August 10 and September 4, 2015, and rejected them on December 21, 2015. The Applicants appealed the RPD's decision to the RAD. The RAD denied their appeal on May 3, 2016.

III. Decision under Review

[5] The Applicants submitted new documents in support of their appeal. The RAD concluded that the documents did not meet the statutory requirements for the admission of new evidence contained in s 110(4) of the IRPA. The RAD also found that the Applicants had an IFA in Tobruk, Libya.

IV. Issues

[6] This application for judicial review raises the following issues:

A. Did the RAD reasonably reject the new evidence submitted by the Applicants?

B. Did the RAD reasonably conclude that the Applicants had an IFA in Tobruk, Libya?

V. Analysis

[7] Decisions of the RAD concerning the admission of new evidence under s 110(4) of the IRPA and its assessment of the evidentiary record, including the availability of an IFA, involve questions of mixed fact and law, and are subject to review by this Court against the standard of

reasonableness (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at paras 23 and 29 [*Singh*]; *Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35 [*Huruglica*]; *Agudelo v Canada (Minister of Citizenship and Immigration*, 2009 FC 465 at para 17). The Court will intervene only if the decision falls outside the "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*]).

A. *Did the RAD reasonably reject the new evidence submitted by the Applicants?*

[8] The RAD refused to admit all of the new documents tendered by the Applicants in support of their appeal. The Applicants challenge only the refusal of the RAD to admit the 2015 UNHCR report. The Applicants rely on the statement in the 2015 UNHCR report that "in the current circumstances, the relevance and reasonableness criteria for an internal flight or relocation alternative are unlikely to be met." The 2014 UNHCR report states only that "[a]ll claims of nationals and habitual residents of Libya seeking international protection should be processed in fair and efficient procedures in accordance with international and regional refugee law."

[9] Pursuant to s 110(4) of the IRPA, an appellant "may present [to the RAD] 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 rejection." The RPD concluded its hearings on September 4, 2015, and issued its decision on December 21, 2015. The UNHCR report is dated October 2015, and was published on November 30, 2015.

[10] The Applicants maintain that the RPD should have considered the 2015 UNHCR report before rendering its decision, because the evidence arose "after the hearing". However, s 110(4) of the IRPA permits appellants to adduce new evidence before the RAD only if it arose "after the rejection of their claim".

[11] The RAD based its decision to exclude the 2015 UNHCR report on the statutory requirements of s 110(4) of the IRPA, the Federal Court of Appeal's decision in *Singh*, the criteria identified in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385, and the *Refugee Appeal Division Rules*, SOR/2012-257. The RAD concluded that the 2015 UNHCR report was available to the Applicants "prior to the rejection of their claims", and that the Applicants had "failed to provide [a] persuasive explanation of why they could not tender the evidence prior to the rejection of their claims." I can find no fault in the RAD's analysis. In my view, the RAD's conclusion that the 2015 UNCHR report was not admissible as new evidence pursuant to s 110(4) of the IRPA was reasonable.

[12] Before this Court, the Applicants raise a new argument in support of their position that the RPD and RAD should both have considered the 2015 UNHCR report before rendering their decisions. They note that the 2015 UNHCR report forms a part of the National Documentation Package produced by the IRB and published on its website. The Applicants therefore maintain that the 2015 UNHCR report should be "deemed" a part of the record before the RPD and, by extension, before the RAD.

[13] The Applicants rely on Justice Southcott's finding in *Saalim v Canada (Citizenship and Immigration)*, 2015 FC 841 at paragraph 26 that "[t]he applicants' appeal should have had the benefit of an informed assessment by the RAD of the relevant country condition documents", adopting Justice Harrington's observation in *Myle v Canada (Citizenship and Immigration)*, 2007 FC 1073 at paragraph 20 that the RPD has "a duty to, at the very least, consider the information in its own documentary package, most of which is readily available in the Board's own website."

[14] The difficulty with this argument is that it was never presented to the RAD. As the Federal Court of Appeal explained in *Canada (Citizenship and Immigration) v R. K.*, 2016 FCA 272 at paragraph 6, "the reasonableness of the Appeal Division's decision cannot normally be impugned on the basis of an issue not put to it particularly where, as in the present case, the new issue raised for the first time on judicial review relates to the Appeal Division's specialized functions or expertise (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paragraphs 23-25)." The Federal Court of Appeal's decision in *Huruglica* at paragraph 79 is to similar effect.

[15] Because the argument that the 2015 UNHCR report should be deemed a part of the record was not advanced before the RAD, it cannot form the basis for a successful application for judicial review in this case.

B. *Did the RAD reasonably conclude that the Applicants had an IFA in Tobruk, Libya?*

[16] In finding that the Applicants had an IFA in Tobruk, Libya, the RAD relied on the Federal Court of Appeal's decision in *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (CA) at 710, which it summarized as follows:

> 1) the Board must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the part of the country to which it finds an IFA exists and/or the claimant would not be personally subject to a risk to life or a risk of cruel and unusual treatment or punishment or a danger, believed on substantial grounds to exist, of torture in the IFA.
>
> 2) moreover, the conditions in the part of the country considered to be an IFA must be such that it would not be unreasonable, in all the circumstances, including those particular to the claim, for the claimant to seek refuge there.

[17] The Applicants do not dispute that the first branch of the IFA test is met. They acknowledge that they would not be targeted or otherwise persecuted in Tobruk.

[18] The RAD acknowledged that the IFA must be a "realistic and attainable option", and that the Applicants were not expected to encounter greater danger or undergo undue hardship in travelling to or remaining in the proposed IFA (citing *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 at 596-99 [*Thirunavukkarasu*]).

[19] The RAD accepted that conditions had generally deteriorated in Libya, the Applicants had not resided in and had no connection to Tobruk, and Mr. Abdulmaula's job prospects were uncertain. The RAD nevertheless concluded that it was reasonable for the Applicants to settle in

Tobruk. The RAD found that the evidence submitted by the Applicants did not relate specifically to conditions in Tobruk. The RAD concluded:

> Having considered the conditions in Tobruk and all the circumstances of this case, including those particular to the Appellants, the RAD finds that it is not unreasonable for the Appellants to relocate to Tobruk. The RAD finds that given their status afforded to them by their education, ability to speak English and ability to communicate in the national language, they face limited cultural or linguistic barriers in relocating to Tobruk. The RAD notes that the Appellants can travel to Tobruk directly without having to return to Tripoli. The people of Cyrenaica in general and Tobruk in particular speak the same regional dialect as the people of Tripolitania and Tripoli.

[20] The RAD rejected the Applicants' argument that having no connection to Tobruk amounted to undue hardship, noting that there is a "very high threshold" and "hardship associated with dislocation and relocation is not the kind of undue hardship that renders an IFA unreasonable" (citing *Thirunavukkarasu*).

[21] The Applicants argue that the RAD's assessment of Tobruk as an IFA was unreasonable, and point to the temporary suspension of removals to Libya from Canada currently in effect. They rely on Justice Hughes' comment in *Kawa v Canada (Citizenship and Immigration)*, 2015 FC 737 at paragraph 8 [*Kawa*]:

> [T]he fact that a country is on a do not remove list is not to be ignored; it is to be taken into account as one of the factors under consideration. In other words, if a country is dangerous where many are killed or subjected to cruelty, a place within that country is not "safe" simply because fewer people are shot or subjected to cruelty within some area there.

[22] The Applicants also say that Mr. Abdulmaula's fear of kidnapping should have been addressed as part of the second branch of the IFA test, and that the RAD erred by "importing into its IFA analysis the requirement that the Applicants "attempt relocation" prior to having fled Libya."

[23] The Respondent says that the temporary suspension of removals to Libya is "separate and apart from the RAD's finding that the Applicants would be able to internally relocate within Libya to the city of Tobruk," and means only that the Applicants will not be removed to Libya "unless and until it is safe to return to the country from Canada." The Respondent notes that this case is distinct from *Kawa*, as that decision arose in the context of a pre-removal risk assessment involving an applicant who could not benefit from a temporary suspension of removals to Afghanistan because he was found to be inadmissible to Canada under s 36(1)(a) of the IRPA. In this case, the Applicants do benefit from the temporary suspension of removals.

[24] I agree with the Respondent that the temporary suspension of removals to Libya does not detract from the reasonableness of the RAD's conclusion that the Applicants have an IFA in Tobruk. Furthermore, the Applicants again failed to advance this argument before the RAD.

[25] The Applicants do not dispute the RAD's conclusion that they would be safe from persecution in Tobruk. In my view, the RAD reasonably concluded that returning to Libya and settling in Tobruk, despite the Applicants' lack of prior connections and uncertain employment prospects, would not amount to undue hardship. Read as a whole, the RAD's decision does not

suggest that the Applicants must have tried and failed to settle in Tobruk before this could be rejected as an IFA. The RAD's conclusion falls within a range of possible, acceptable outcomes.

VI. Conclusion

[26] The application for judicial review is dismissed. Neither party proposed that a question be certified for appeal.

JUDGMENT

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

No question is certified for appeal.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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