

Federal Court



Cour fédérale

Date: 20170629

Docket: IMM-3248-16

Citation: 2017 FC 635

Ottawa, Ontario, June 29, 2017

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

**LOVETH OGHOMWEN OSAGIE
BRITNEY OLAMIDE DUROJAIYE
KENDRICK OLADIP DUROJAIYE**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Loveth Oghomwen Osagie and her two children, the Applicants, are citizens of Nigeria. They left Nigeria in August 2015 and made a claim for refugee protection on the basis that members of her husband's family believed Ms. Osagie and her daughter were witches and

wanted them to undergo female genital mutilation. The original claim also included Ms. Osagie's husband and their third child who is a citizen of the United States.

[2] Before the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada the Minister of Public Safety [Minister] intervened on the basis that there was serious reason to believe that Ms. Osagie's husband had committed a serious non-political crime excluding him from refugee protection. On the basis of the Minister's intervention the Applicants sought to have the husband's claim disjoined before the RPD. The request was denied on the basis that the issues raised were similar, the family remained a family unit living together, and Ms. Osagie's claim was based on what was told to her by her husband. The RPD concluded the husband was excluded from protection and determined that the remaining claimants were not in need of protection. In reaching its conclusion the RPD identified credibility concerns and concluded that an Internal Flight Alternative [IFA] was available.

[3] The RPD decision was appealed to the Refugee Appeal Division [RAD]. The RAD concluded that Ms. Osagie's husband was an excluded person on the basis of serious non-political criminality and that her one son who is a citizen of the United States was not in need of protection. In regard to the remaining Applicants before this Court the RAD found that they had an IFA in Abuja or Port Harcourt and dismissed the appeal.

[4] The Applicants now seek judicial review of the RAD decision. Ms. Osagie's husband and her son are not applicants in this matter. Ms. Osagie's affidavit evidence refers to her husband as "estranged". In written submissions Ms. Osagie argues that the IFA analysis is flawed because it

failed to consider the circumstances of a single mother with two minor children. Ms. Osagie's written submissions further argue that the RAD erred in: (1) not making an overall credibility finding; (2) in not conducting a state protection analysis; and (3) in implicitly rendering implausibility findings.

[5] Having carefully considered the submissions of the Parties I am unable to conclude that the RAD committed a reviewable error in finding that a viable IFA was available to the Applicants in Nigeria. The RAD identified the correct IFA test and applied that test to the facts that were before it based on the record and the submissions of the Applicants. The IFA finding is determinative. The application is dismissed for the reasons that follow.

II. Standard of Review

[6] This issue raised in this Application engage questions of mixed fact and law that are to be reviewed against a standard of reasonableness. (*Kastrati v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1141, 172 ACWS (3d) 180; *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47, 53-56 and 62, [2008] 1 SCR 190 [*Dunsmuir*]). Where the decision falls within the range of reasonable acceptable outcomes which are defensible in respect of the facts and the law the Court will not intervene (*Dunsmuir* at para 47).

III. Analysis

A. *Preliminary Issue*

[7] The affidavit of Ms. Osagie affirmed in support of this Application states she is estranged from her husband. The Respondent notes that Ms. Osagie does not indicate when the estrangement began and provides no additional evidence of estrangement. The Respondent argues that there was no indication in the evidence before the RAD that the couple was estranged, rather the evidence indicated they were together as husband and wife. The Respondent submits the evidence of estrangement is new evidence that was not before the RAD and therefore should be struck or disregarded.

[8] In *Lemiecha v Canada (Minister of Employment and Immigration)* (1993), 72 FTR 49, 24 Imm LR (2d) 95 [*Lemiecha*], Justice Frederick Gibson stated at paragraph 4 that: “It is trite law that judicial review of a decision of a federal board, commission or other tribunal should proceed on the basis of the evidence that was before the decision-maker.” While there are exceptions to the principle that a judicial review will proceed on the basis of the evidence before the decision-maker, none of those exceptions are applicable here (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20; 428 NR 22).

[9] The evidence of estrangement is new evidence and will not be considered on this Application.

B. *Was the IFA determination reasonable?*

[10] Ms. Osagie's counsel argues that the IFA decision is unreasonable. Counsel submits that the failure to consider the claim of Ms. Osagie and her children separately from the circumstances of her husband, the absence of a general credibility finding and the failure to complete a state protection analysis all undermine the reasonableness of the IFA decision. Counsel further submits the RAD decision simply rubberstamps the RPD decision. I disagree.

[11] At the outset, I note that the appellants before the RAD included Ms. Osagie's husband and her son. I also note the appellants did not make any submissions to the RAD to the effect that the appeals should be considered separately or that circumstances warranted a separate analysis for any one or more of the appellants.

[12] It is well-established that each refugee claim must be considered on its individual merits. However this principle does not exclude a consideration of family and social circumstances in assessing issues relevant to the claim, including the viability of an IFA. These circumstances cannot, as Ms. Osagie's counsel submits, be ignored or overlooked simply on the basis that one member of the family has been found to be excluded on a separate ground.

[13] The evidence before the RAD was that the appellants were a family unit and living as such. There was no evidence placed before the RAD indicating these circumstances had changed. The RAD was under no obligation to speculate as to future possible circumstances in the conduct of its analysis on the appeal. The RAD did not err in considering the circumstances

of Ms. Osagie and her children within the context of her family circumstances and as those circumstances were reflected in the evidence before the RAD.

[14] In addressing the question of an IFA the RAD began its analysis by citing the well-established two prong IFA test, (1) there is no serious possibility of the claimant being persecuted within the proposed IFA; and (2) it would not be unreasonable in all the circumstances, including those particular to the claimant, for the claimant to seek refuge in the IFA (*Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FCR 706, [1991] FCJ No 1256 (CA) *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FCR 589, 109 DLR (4th) 682 (CA)).

[15] In considering the reasonableness of the proposed IFAs the RAD undertook a detailed examination of the circumstances. It noted the absence of any evidence to indicate the alleged agents of persecution, members of Ms. Osagie's husband's family, possessed a profile that would allow them to locate the Applicants. The RAD noted that the evidence indicated the family members lacked the resources and authority within society to locate or initiate a search for the Applicants. The RAD also noted the absence of any evidence in support of the claim that Ms. Osagie's husband was known throughout Nigeria due to appearances on television.

[16] The RAD reasonably concluded that it was unlikely people in Port Harcourt or Abuja would know or recognize the Applicants or perceive Ms. Osagie to be a witch based on the evidence presented. The RAD reasonably concluded that the Applicants failed to "establish, on a balance of probabilities, that there [was] a serious possibility of being persecuted in the IFA

cities or that they would be personally subjected 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 Abuja, or Port Harcourt.”

[17] In reaching this conclusion the RAD also considered any risk from the Nigerian Police Force. The RAD noted: the absence of any persuasive evidence indicating the Applicants were being sought by police or that others were actively searching for them; the size of the country; the population within the IFA cities; and the lack of motivation and ability of the Nigerian Police Force to apprehend the Applicants. After addressing and weighing these factors the RAD reasonably concluded on a balance of probabilities that there was no serious possibility of persecution within the identified IFAs. This finding was reasonably open to the RAD in light of the scarcity of evidence demonstrating a risk of persecution or the absence of state protection.

[18] In addressing the second prong of the test, the RAD reviewed the psychological evidence and accepted the diagnosis that Ms. Osagie suffered from “stressor related disorder with prolonged duration”. The RAD noted the absence of any evidence indicating ongoing or follow-up treatment and cited the objective documentary evidence before it identifying the availability and accessibility of adequate mental health services in Abuja and Harcourt.

[19] The RAD assessed the ability to relocate to one of the proposed IFAs based on the evidence before it. The RAD found that the situation of the appellants, a husband and wife who could be relocating together, was not equivalent to the situation of a woman relocating on her own. In doing so they found that in conflating these two different circumstances the evidence and

considerations provided to women relocating on their own did not apply and as such the appellants could live in any of the proposed IFAs. This conclusion was consistent with the evidence and reasonable.

[20] Inappropriate implicit plausibility findings are raised in Ms. Osagie's written submissions, however the argument was not advanced in any detail in these written submissions or in oral argument. I have carefully reviewed the RAD decision and am unable to identify any conclusions rooted in an inappropriate plausibility finding. The RAD's decision was based on the deficiency of evidence not plausibility findings arising out of the evidence.

[21] In summary, the RAD undertook a detailed and independent assessment of the evidence as it related to the IFAs. The RAD identified and considered the issues raised on the appeal, and did not merely rubber stamp the RPD decision. In undertaking a fulsome and detailed analysis the RAD reached the same conclusions as the RPD due to the insufficiency of evidence favouring the appellants. There was no need for the RAD to make a general credibility finding in this circumstance. The RAD's decision satisfies the requirements of justification, transparency and intelligibility.

IV. Conclusion

[22] The RAD's decision falls well within the range of possible, acceptable outcomes that are defensible with respect to the facts and law (*Dunsmuir* at para 47). The Application is dismissed.

[23] The Parties have not identified a question of general importance for certification and none arises.

JUDGMENT IN IMM-3248-16

THIS COURT'S JUDGMENT is that the Application is dismissed. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3248-16

STYLE OF CAUSE: LOVETH OGHOMWEN OSAGIE BRITNEY OLAMIDE
DUROJAIYE KENDRICK OLADIP DUROJAIY v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: FEBRUARY 7, 2017

REASONS AND JUDGMENT: GLEESON J.

DATED: JUNE 29, 2017

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