Federal Court  Cour fédérale

Date: 20200131

Docket: IMM-3336-19

Citation: 2020 FC 180

Ottawa, Ontario, January 31, 2020

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

CHUKWUMA OGBONNA OBIANUJU
CHRISTINANA CHUKWUMA
CHIAMAKA VICTORY OGBONNA
BLESSING CHIDIMA CHUKWUMA OGBONNA
CHIMAOBI VICTOR OGBONNA

Applicants

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is the judicial review of a decision by the Refugee Appeal Division ("RAD") of the Immigration and Refugee Board of Canada dismissing the Applicants' appeal and confirming the decision of the Refugee Protection Decision ("RPD") pursuant to s 111(1)(a) of the *Immigration*

and Refugee Protection Act, SC 2001, c 27 ("IRPA"). The RAD concluded that the Applicants were not Convention refugees nor persons in need of protection pursuant to ss 96 and 97 of IRPA, respectively.

[2] For the reasons that follow, I am dismissing this application for judicial review.

Background

[3] The Applicants are a family of five. The Principal Applicant and his children are citizens of both Nigeria and South Africa. The Principal Applicant's wife is a citizen of Nigeria only.

[4] The Applicants claim that in 2008, shortly after the birth of the couple's eldest daughter, the Principal Applicant's mother and other women visited to pick a date to subject the child to female genital mutilation ("FGM"). The Principal Applicant's wife delayed the FGM and the family fled to Enugu. Following a phone call from the Principal Applicant's mother who wanted the child to be returned, the Applicants fled to South Africa in July 2008.

[5] The Applicants travelled to Canada in December 2016 and claimed refugee protection based on the risk of FGM to the minor female Applicants. They also claimed they feared xenophobic violence in South Africa. The Principal Applicant claimed he could not return to Nigeria due to his father's role in the Biafran war and his support for the actualization of the Biafran state.

[6] In a decision dated May 16, 2018, the RPD denied the Applicants' claim. The determinative issue was the existence of an internal flight alternative ("IFA") in Lagos, Nigeria. The Applicants appealed to the RAD, and by a decision dated May 8, 2019, the RAD confirmed the decision of the RPD. This is the judicial review of the RAD's decision.

Decision under review

[7] As discussed further below, in their application for judicial review the Applicants do not assert any actual errors of fact or law in the RAD's decision. Rather, they submit that the RAD breached procedural fairness by failing to remit the matter back to the RPD for redetermination. For that reason, and although the RAD provided comprehensive and coherent reasons for its decision, only those aspects of its decision which pertain to the alleged breach of procedural fairness are described below.

[8] In that regard, the RAD set out the five factual errors made by the RPD, as identified by the Applicants. The RAD noted the Applicants' position that the significant nature of the errors suggested that part of the RPD's reasons for the decision may have been based on facts from another claim, that this was fatal to the RPD's decision, and required that their claim be sent back to the RPD for redetermination. However, the RAD found that the correct facts were used by the RPD in its actual analysis. Further, that the Applicants had made no submissions as to how they were prejudiced by the errors, which were found in the summary at the beginning of the decision, when the RPD based its subsequent risk assessment on accurate findings of fact.

[9] The RAD agreed that the RPD erred in making the identified factual errors in the summary of its facts. The RAD found, however, that because the RAD can correct errors and substitute its own decision for that of the RPD, those errors alone did not justify returning the matter to the RPD. The RAD also stated that it would take the correct facts into consideration when assessing the correctness of the RPD's decision.

Issues

[10] Both parties rely on their respective submissions made at the leave stage. The Applicants raise one issue which they frame as:

> Did the RAD breach principles of procedural fairness by failing to refer the matter back to the RPD to be decided by another member?

[11] As will be discussed below, although the Applicants have framed this matter as one of procedural fairness, in reality, it is a challenge to the reasonableness of the RAD's decision.

Standard of Review

[12] Subsequent to the parties filing their written submissions, the Supreme Court of Canada issued its decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*"), which revisited the standard of review applicable to administrative decisions. Accordingly, I invited counsel, when appearing before me, to address the decision. They submitted, and I agree, that the standard of review for issues of procedural fairness is correctness

(*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Vavilov* at paras 16, 23), and that for review of the merits of a decision the standard is reasonableness.

[13] In *Vavilov*, the Supreme Court held that there is a presumption that reasonableness is the applicable standard whenever a Court reviews an administrative decision (*Vavilov* at paras 16, 23, 25). That presumption can be rebutted in two types of situations. The first being where the legislature explicitly prescribes the applicable standard of review or where it has provided a statutory appeal mechanism from an administrative decision to a court. The second being when the rule of law requires that the standard of correctness be applied. This will be the case in certain categories of questions, namely, constitutional questions, general questions of law of central importance to the legal system as a whole, questions regarding jurisdictional boundaries between administrative bodies, or any other category that may subsequently be recognized as exceptional and also requiring review on the correctness standard (*Vavilov* at paras 17, 69).

[14] The majority in *Vavilov* held that, "it is the *very fact* that the legislature has chosen to delegate authority which justifies a default position of reasonableness review" (*Vavilov* at para 30, emphasis original). In this matter, in reviewing the RAD's decision, the presumptive reasonableness standard applies because the RAD has the delegated authority to make the decision under review. The Applicants did not suggest that any of the circumstances exist which might rebut the presumption in this case and, in my view, none exist.

Analysis

Applicants' Position

[15] The Applicants' submissions on this single issue are lengthy but boil down to the argument that the RAD breached its duty of procedural fairness when it refused the Applicants' request to return the matter to the RPD for redetermination, instead electing to confirm the RPD's decision. The Applicants submit that the RPD made multiple, significant factual errors, leading to the conclusion that the RPD did not properly consider the written and oral evidence and had confused their claim with another. Because of this, the RPD's decision did not meet their legitimate expectation for a fair and intelligible decision. The Applicants submit that to adhere to the principles of procedural fairness, and the Applicants' legitimate expectations, the RAD was required to refer the matter back to the RPD.

[16] The Applicants accept that the RAD must exercise a degree of restraint before substituting its own decision of that of the RPD (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 70 ("*Huruglica*")), but contend this also means that the RAD should show restraint before confirming a decision. In this situation, the seriousness of the factual mistakes made by the RPD meant that the RAD was required to exercise restraint.

Respondent's Position

[17] The Respondent submits that the RAD may only remit a claim back to the RPD when the RAD is of the opinion that it cannot provide a final determination without hearing the oral evidence presented to the RPD (*Huruglica* at para 103; ss 111(1)(c), (2) of IRPA).

[18] The RAD acknowledged that, in its initial summary of the facts, the RPD made a number of factual errors, but the RAD also noted that when the RPD actually conducted its analysis it relied on correct facts. Therefore, that it was not clear how the Applicants were prejudiced. Further, the RAD properly held that it could correct the RPD's errors and substitute its own decision. There was no suggestion that the RAD was incapable of making a final determination based on the evidence that was before it. The Respondent submits that the RAD's finding was reasonable and consistent with the legislation and jurisprudence. Further, that the Applicants could not have a legitimate expectation that the matter would be sent back to the RPD as this would be contrary to the legislation and jurisprudence.

Analysis

[19] I first observe that the five factual errors made by the RPD and identified by the Applicants are all contained in the section entitled "Allegations" which appears at the beginning of the decision and prior to the section of the decision entitled "Analysis".

[20] These were as follows:

> - The RPD stated that at the child's fourth birthday her grandmother announced that the child would be circumcised (subjected to FGM) at five years of age. In fact, the evidence was that the grandmother had announced that the child would be subjected to FGM at 3 months of age when the grandmother came to the Applicants' home to arrange this;
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> - The RPD stated that the principal claimant alleged that she had been threatened by her husband's family for refusing the proposed FGM and that this caused her to have a miscarriage on September 16, 2016. The Applicants submit that the Principal Applicant's wife was not pregnant in 2016, she did not lose a child,

> and that the youngest child of the family was born on November 23, 2012;
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> - The RPD stated that the principal claimant stated that her father-in-law is a retired superintendent of police and alleged that the claimants would not be able to relocate as his connections would allow the family to be tracked throughout Nigeria. The Applicants say that this is completely false and that they gave no such evidence;
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> - The RPD stated that the Applicants left Nigeria on October 12, 2016. However, the evidence was that they left South Africa on December 2, 2016 and arrived in Canada on December 3, 2016;
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> - The RPD sated that the Principal Applicant's father lives in Enugu state, Nigeria, but the evidence was that he lives in Abia state.

[21] Although the RAD found that the Applicants had not explained how the errors found in this initial section of the RPD's decision prejudiced them, given that the RPD had relied on the correct facts in its actual analysis, nor do the Applicants now explain this in their submissions on judicial review. The Applicants point to nothing in the RPD's analysis to support this, or their allegation that the RPD did not properly consider the written and oral evidence when conducting its analysis. And, while they assert that the errors go to the heart of their claim, they do not explain, for example, how the error in the child's age is such an error. The heart of their claim was the allegation of risk of FGM. The age of the child when that risk is alleged to have first manifested itself would appear to be a peripheral point. Further, the RAD stated that it utilized the corrected facts in its assessment. The Applicants point to no related error in the RAD's analysis.

[22] The Applicants also assert that the above errors suggest that the RPD may not have considered all of the relevant information and that the RPD may have made other errors. They

submit that the RAD may not have recognized those other errors when it conducted the appeal. There is no merit in this submission. The Applicants do not identity any further factual or other errors to substantiate their submission, and the RAD explicitly addressed the factual errors that the Applicants did identify as well as the Applicants' assertion that the RPD erred in its application of the *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution*, and in concluding that the risk to the Applicants did not extend to Lagos. And, when making its decision, the RAD had before it the whole of the record that was before the RPD.

[23] In any event, I agree with the Respondent that the Applicants' assertion that the RAD breached procedural fairness by not remitting the matter back to the RPD for redetermination cannot succeed.

[24] Section 111(1) of the IRPA is not mentioned by the Applicants. However, it sets out how the RAD is to proceed when it has considered an appeal.

[25] Section 111 (1) of the IRPA states:

> 111(1) After considering the appeal, the Refugee Appeal Division shall make one of the following decisions:
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> (a) confirm the determination of the Refugee Protection Division;
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> (b) set aside the determination and substitute a determination that, in its opinion, should have been made; or
>
> (c) refer the matter to the Refugee Protection Division for re-determination, giving the directions to the Refugee Protection Division that it considers appropriate.

> (2) The Refugee Appeal Division may make the referral described in paragraph (1)(c) only if it is of the opinion that
>
> (a) the decision of the Refugee Protection Division is wrong in law, in fact or in mixed law and fact; and
>
> (b) it cannot make a decision under paragraph 111(1)(a) or (b) without hearing evidence that was presented to the Refugee Protection Division.

[26] Thus, the governing legislation makes it clear that the RAD can only remit a matter back to the RPD for redetermination where the RAD forms the view that RPD was wrong in law, in fact, or in mixed fact in law, *and* that the RAD cannot make a final determination without hearing the oral evidence presented at the RPD.

[27] The Federal Court of Appeal's decision in *Huruglica* considered s 111 of the IRPA, and the following paragraphs are relevant to this analysis:

> [58] Sections 110 and 111…deal with appeals from the RPD to the RAD. Subject to my comments with respect to paragraph 111(2)(b), I generally agree with the RAD's finding that neither section 110 nor 111, nor the legislation as a whole, point to the need to show deference to the RPD's findings of fact. As acknowledged by the RAD in this case, these provisions evidence the legislator's intent that the RAD bring finality to the refugee claims determination process.
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> [59] In particular, paragraph 111(2)(a) indicates that the RAD does not need to defer for factual findings. Paragraph 111(2)(a) does not distinguish between errors of law, fact or mixed fact and law. It simply requires that the decision of the RPD be "wrong in law, in fact or in mixed law and fact" (in French: "erronée en droit, en fait ou en droit et en fait").
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> …
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> [69] I now turn to paragraph 111(2)(b). It provides that once an error has been identified (paragraph 111(2)(a)), the RAD may refer

> the matter back for redetermination with the directions that it considers appropriate only if it is "of the opinion" that it cannot make a decision confirming or setting aside the RPD decision without hearing the evidence presented before the RPD. This possibility acknowledges the fact that in some cases where oral testimony is critical or determinative in the opinion of the RAD, the RAD may not be in a position to confirm or substitute its own determination to that of the RPD.
>
> …
>
> [103] I conclude from my statutory analysis that with respect to findings of fact (and mixed fact and law) such as the one involved here, which raised no issue of credibility of oral evidence, the RAD is to review RPD decisions applying the correctness standard. Thus, after carefully considering the RPD decision, the RAD carries out its own analysis of the record to determine whether, as submitted by the appellant, the RPD erred. Having done this, the RAD is to provide a final determination, either by confirming the RPD decision or setting it aside and substituting its own determination of the merits of the refugee claim. It is only when the RAD is of the opinion that it cannot provide such a final determination without hearing the oral evidence presented to the RPD that the matter can be referred back to the RPD for redetermination. No other interpretation of the relevant statutory provisions is reasonable.

[28] The Federal Court of Appeal in *Huruglica* elaborated that redetermination may be required where the RPD finds that a witness was not credible based on discrepancies that do not exist or do not support that conclusion; then, if the RAD finds that "the weight to be given to this testimony is essential to determine whether the RPD decision should be confirmed or set aside, the RAD may conclude that it is a proper case to refer back to the RPD with specific directions in respect of the error identified in the credibility findings" (*Huruglica* at para 73).

[29] Here, the Applicants submit that s 111(2)(b) applies because the factual errors made by the RPD were so egregious that they justify sending the decision back to the RPD. While I am

not convinced that the errors were serious and went to the heart of the claim, this is of no matter. Section 111(2) of IRPA and *Huruglica* are clear that the RAD may only remit the RPD's decision back for redetermination where it is of the opinion that an error occurred and that it cannot confirm the RPD's decision or set it aside and substitute its own decision because it could not make those decisions without hearing the evidence presented at the RPD.

[30] The Applicants also submit that there was no issue of credibility, as the RPD found the Applicants to be credible. In my view, this means that this is not a situation where the RAD's decision would turn on evidence heard by the RPD that was at issue and therefore may have required that the matter be sent back for redetermination by the RPD.

[31] Further, this Court had previously found that even when the RAD finds that the RPD has made an error of fact, this alone does not compel the RAD to remit the matter back to the RPD for redetermination:

> [31] With respect to the RPD's error of fact, or of mixed fact and law, Mr. Liao notes that the RAD found that there was insufficient evidence on the record for the RPD to find that he was not being pursued by the PSB.
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> [32] However, despite having made this finding, the RAD was not obliged to refer the matter back to the RPD for a redetermination. Paragraph 111(2)(a) states that the RAD may make the referral described in paragraph 111(1)(c), if it is of the opinion that the RPD's decision was wrong in fact, in mixed law and fact, or in law. This makes it clear that the RAD retains discretion to take one of the actions described in paragraphs 111(1)(a) and (b), rather than taking the action described in paragraph 111(1)(c), even where it finds that the RPD made one of the types of errors mentioned in paragraph 111(2)(a).

(*Liao v Canada (Citizenship and Immigratio*n), 2017 FC 1163, emphasis original).

[32] In my view, in this case the Applicants have not made an argument that falls within the parameters of the RAD's ability to remit a case back to the RPD. Therefore, the Applicants' claim is bound to fail.

[33] As to the Applicants' submission, relying on G*uerrero v Canada (Citizenship and Immigration)*, 2011 FC 1210 at paras 20, 23 ("*Guerrero*")), that this Court has previously decided that errors made by the RPD may lead to a decision being set aside and referred back to a different decision maker of the RPD, this would appear to be based on a misunderstanding of *Guerrero*. There, a decision of the RPD was the subject of a judicial review before this Court. This Court found that errors in the decision caused it to be unreasonable and, therefore, it was to be remitted back to the RPD for redetermination. *Guerrero* was not a judicial review of a decision of the RAD. Section 111(1) of the IRPA was not engaged.

[34] The Applicants' legitimate expectations argument is that they had a legitimate expectation to receive a coherent decision from the RPD and that, given the serious mistakes by the RPD, those expectations were not met. Therefore, the duty of fairness owed to them was breached. In my view, there is also no merit to this submission. The Supreme Court in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 14 Admin LR (3d) 173 at para 26 ("*Baker*") identified factors that inform the content of the duty of fairness, one of which is a "legitimate expectation". If a party has a legitimate expectation that a procedure will be followed, or that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded. This is based on the principle that the circumstances affecting procedural fairness take into account the promises or regular

practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

[35] I agree with the Respondent that the Applicants cannot have a legitimate expectation of a result that legislation expressly precludes. The RAD did not breach its duty of procedural fairness by declining to remit the matter back to the RPD for redetermination.

[36] Finally, although the Applicants have framed this issue as one of procedural fairness, in my view, it is not correctly framed. The Applicants argue that they had a legitimate expectation to receive a coherent decision from the RPD. However, reasonableness in administrative decision-making requires that where reasons are given that they will be coherent, intelligible, transparent and justified (*Vavilov* at para 15). What the Applicants are really attacking, but do not address, is the reasonableness of the RAD's refusal to refer the matter back to the RPD pursuant to s 111(1)(c) which, inferentially, involves an interpretation of s 111(2) of the IRPA. The interpretation of home statues by administrative decision makers is governed by the reasonableness standard (*Vavilov* at para 25).

[37] Further, the Applicants' approach largely ignores the intended role of the RAD. The RAD sits in appeal of the RPD's decisions and, except in the limited circumstances described in s 111(2) of the IRPA, it makes the final call, subject only to judicial review by this Court. Even when the RPD is wrong, the RAD can substitute its own decision. This is intended to promote finality in the claims process. The Applicants' procedural fairness argument appears to be a

veiled attempt to circumvent an appeal decision in order to reargue the matter before the RPD. This cannot succeed.

JUDGMENT in IMM-3336-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. There shall be no order as to costs; and

3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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