Federal Court  Cour fédérale

Date: 20210628

Docket: IMM-4120-21

Citation: 2021 FC 679

Ottawa, Ontario, June 28, 2021

PRESENT: Mr. Justice McHaffie

BETWEEN:

ADEBANKE DEBORAH OGUNKOYA
VERONICA ADE
OLUWAFEMISOLA OLUWADAMILOLA OGUNKOYA
ERIOLUWA OLUWAFOLAJIMI OGUNKOYA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. Overview

[1] The applicants seek a stay of their removal to Nigeria until the Court has disposed of their application for leave and judicial review of the refusal of an Officer with the Canada Border Services Agency (CBSA) refusing their request to defer the removal. The removal order is

scheduled to be executed on June 30, 2021. On June 17, 2021, the Officer denied the applicants' request that their removal be deferred until a recently filed application for permanent residence on humanitarian and compassionate (H&C) grounds was determined.

[2] For the reasons that follow, I conclude that the applicants have not demonstrated on the applicable standard that their application for leave and judicial review raises a serious issue with respect to the reasonableness of the Officer's decision. The applicants' motion for a stay is therefore dismissed.

II. Issues

[3] To obtain a stay of removal pending an application for leave and judicial review, the applicants must demonstrate that (1) the underlying application raises a serious issue for determination; (2) they will suffer irreparable harm if the stay of removal is not granted; and (3) the balance of convenience favours granting the stay: *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at p 334; *Toth v Canada (Minister of Employment and Immigration)*, 1988 CanLII 1420 (FCA). The Court will assess these elements and the relevant facts, and will determine whether a stay is just and equitable in all the circumstances of the case: *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at paras 1, 25.

[4] The issues on this motion are therefore the following:

A. Have the applicants demonstrated a serious issue in their application for leave and judicial review of the decision of the Officer denying a deferral of removal?

B. Have the applicants demonstrated that they will suffer irreparable harm if the stay is not granted?

C. Does the balance of convenience favour the granting of the stay?

[5] I conclude that the applicants have not demonstrated a serious issue to be determined on the underlying application for leave and judicial review, and that this is determinative of the applicants' motion. I therefore need not assess the final two issues, since the three elements of this test are conjunctive and must all be satisfied: *Es-Sayyid v Canada (Public Safety and Emergency Preparedness)*, 2012 FCA 59 at para 7.

III. Analysis

A. *The applicants have not demonstrated a serious issue*

(1) General principles

[6] The parties agree on the general principles relevant to the "serious issue" element of the analysis for a stay. It is worth underscoring that a stay pending the determination of an application for leave and judicial review is a form of interlocutory relief tied to the application itself: *Federal Courts Act*, RSC 1985, c F-7, ss 18, 18.1, 18.2. Where no serious grounds for challenge of an administrative decision are presented, a stay pending judicial review would amount to no more than a free-standing request for delay, which is not justified in the context of the requirement that a removal order be enforced "as soon as possible": *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], s 48(2).

[7] This concern becomes heightened where a stay is sought pending an application for judicial review of a refusal to defer removal. In such circumstances, the issuance of the stay will effectively give the applicants the remedy sought on the application, namely a deferral of removal. The Federal Court of Appeal has therefore held that the "serious issue" element of the test for a stay in such cases is to be assessed on what is termed an elevated standard. Under this standard, the "serious issue" element will only be met if on a "hard look" at the issues, the applicants have put forward "quite a strong case" or established a "likelihood of success on the underlying application": *Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81 at paras 66-67, adopting *Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148 at paras 8-10; *Patel v Canada (Citizenship and Immigration)*, 2018 FC 882.

[8] The standard on which the underlying decision will be reviewed is relevant to the assessment of whether an applicant has shown "quite a strong case" or a "likelihood of success." On judicial review of the Officer's decision, the Court will be called upon to consider whether the decision was unreasonable, in light of the limited discretion of enforcement officers to provide short deferrals based on temporary impediments to removal: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16-17, 23-25; *Forde v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1029 at paras 40-44; *Canada (Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286 at para 45; *IRPA*, s 48(2).

[9] In considering whether a deferral decision is reasonable, the Court will assess whether it is transparent, intelligible, and justified, in relation to the legal and factual constraints that bear

on it, including the evidence and submissions presented: *Vavilov* at paras 15, 86, 95, 99–101, 125–128.

(2) The applicants' refugee claim

[10] The principal applicant and her three dependents are Nigerian nationals who have been living in Canada since they entered in April 2018. They made a refugee claim upon arrival, based on emotional, physical, and sexual abuse of the principal applicant at the hands of her ex-husband (who is believed to no longer be in Nigeria); and threats of violence from her ex-husband's father, the head of a local church, who she also fears will take the children from her.

[11] The family's refugee claim was refused by the Refugee Protection Division (RPD) on April 24, 2019. The RPD found that the applicants had a viable internal flight alternative (IFA) in Port Harcourt. An IFA is a location within the refugee claimant's country of nationality to which they can relocate safely and reasonably. If there is such a location, then a claimant will not be considered a Convention refugee under section 96 of the *IRPA* and will not face a risk of harm "in every part of that country" as required by section 97 of the *IRPA*: *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, 1993 CanLII 3011 (FCA), [1994] 1 FC 589 (CA) at pp 592-593; *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (CA) at p 710; *Velasquez v Canada (Citizenship and Immigration)*, 2010 FC 1201 at para 15. As a result, the existence of a viable IFA is determinative of a refugee claim under either section 96 or 97 of the *IRPA*, regardless of the merits of other aspects of the claim: *Barragan Gonzalez v Canada (Citizenship and Immigration)*, 2015 FC 502 at paras 45-46.

[12] The applicants appealed to the Refugee Appeal Division (RAD), which denied the appeal on December 18, 2019, on the same ground that there was a viable IFA in Port Harcourt. An application to this Court for leave and judicial review of the RAD's decision was unsuccessful.

[13] Subsequent to the RAD's decision in the applicants' case, the Immigration and Refugee Board of Canada (IRB) issued a notice revoking the designation of the May 17, 2018 decision of the RAD in TB7-19851 as a "jurisprudential guide" pursuant to paragraph 159(1)(*h*) of the *IRPA*. Decision TB7-19851, which is referred to as the "Nigeria Jurisprudential Guide," addressed issues including the availability of an IFA in Nigeria: see *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at paras 6, 10, 88–89, 92–101. This revocation forms part of the applicants' arguments on this motion for a stay.

(3) The applicants' request for a deferral of removal

[14] On April 19, 2021, the family filed an application for permanent residence on H&C grounds. This application was returned because of administrative errors in the application, but it was refiled with the assistance of counsel on June 11, 2021. The H&C application notes the revocation of the Nigeria Jurisprudential Guide and argues the revocation was an affirmation of the risks and dangers associated with relocation in Nigeria. It submits that the circumstances in Nigeria leading to the adoption of the Nigeria Jurisprudential Guide have changed and that "reconsideration is owed to all the Nigerian IFA cases" [emphasis in original]. The H&C application goes on to rely on the existence of hardship to the applicants if required to return to Nigeria; considerations relating to the best interests of the child (BIOC); the applicants'

establishment and ties in Canada; and the principal applicant's contributions to Canada as an essential worker during the COVID-19 pandemic.

[15] On May 13, 2021, a removal interview was conducted, and on June 8, 2021 a notification of removal for June 30, 2021 was provided. On June 10, 2021, the applicants filed a request for temporary deferral of the removal order on the basis of (a) the outstanding H&C application; (b) the negative impacts on Canadians given the principal applicant's services as an essential worker during the COVID-19 pandemic; and (c) the hardship the family would face on removal and the best interests of the children.

[16] On June 17, 2021, an Enforcement Case Officer with the CBSA issued their decision denying the request for temporary deferral. With respect to the H&C application, the Officer observed that based on the website of Immigration, Refugees and Citizenship Canada (IRCC), such applications can take from 22 to 36 months to determine. They concluded the recently filed H&C application was not imminent, and noted their limited discretion to defer removal as a temporary measure. With respect to the principal applicant's work as an essential worker, the Officer found that notwithstanding the important nature of the principal applicant's work as a property manager, she did not qualify for existing temporary pathways to permanent residence for failed refugee claimants performing essential services. They therefore did not find this to be a significant factor in the decision, as loss of employment and establishment in Canada are ordinary consequences of removal.

[17] With respect to hardships and difficulties in Nigeria, the Officer considered the impacts on the applicants returning to Nigeria based on the understanding they would be living in Port Harcourt, where the RAD had concluded there was a viable IFA. The Officer noted that a number of the documents the applicants referred to did not pertain to Port Harcourt. They also noted that a number of the issues raised by the applicants, including the potential exposure to a serious possibility of persecution or risks to life or cruel and unusual punishment, had been addressed by the RPD and the RAD, which had concluded there was a viable IFA. The Officer also considered the applicants' arguments and evidentiary references regarding risks of housing and unemployment. They adopted the RPD's conclusion that the principal applicant's education, social status, and work history put her in a better position to secure employment than others in Nigeria. The Officer noted the Federal Court of Appeal's statement, quoting *Wang*, that "deferral should be reserved for those applications where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment": *Baron* at para 51. The Officer concluded that the hardships the applicants would face were the natural consequence of removal.

[18] The Officer also considered the best interests of the children. They considered the arguments made and documents filed, and noted they had delayed removal until June to allow the children to finish the school year and give the family the summer to settle and find a new school in Port Harcourt. Finally, the Officer considered the impacts of the COVID-19 pandemic and comparative statistics in Canada and Nigeria, concluding the risk of infection was not higher in Nigeria than in Canada. The Officer concluded there would be some hardship, but the family would not be at risk of "death, extreme sanction or inhumane treatment." They therefore denied the deferral request.

[19] This denial is the subject of the application for judicial review underlying this stay.

(4) The applicants' challenges to the Officer's decision

[20] The applicants raise two primary challenges to the Officer's decision. First, they allege the Officer erred in their assessment of the IFA and failed to assess material objective evidence that Port Harcourt was not a viable IFA. Second, they allege the Officer erred in failing to properly consider the applicants' risk and establishment factors.

(a) *There is no serious issue regarding the Officer's reference to the RPD and RAD conclusions that there is an IFA in Port Harcourt*

[21] The applicants argue the Officer erred in relying on the decisions of the RPD and the RAD, which were decided prior to the revocation of the Nigeria Jurisprudential Guide. They note that this Court has found that where the RPD or RAD made findings based on a subsequently revoked jurisprudential guide, those findings are weakened by that revocation: *Liu v Canada (Citizenship and Immigration)*, 2020 FC 576, citing *Liang v Canada (Citizenship and Immigration)*, 2019 FC 918 at para 10 and *Cao v Canada (Citizenship and Immigration)*, 2020 FC 337 at para 38. While the applicants do not challenge the RAD's decision itself, they argue that the issue of an IFA for the applicants ought to be "reassessed" in light of the revocation of the Nigeria Jurisprudential Guide.

[22] I disagree. The fact that the RAD's decision was issued at a time when the Nigeria Jurisprudential Guide was in force does not mean either that the Officer was required to

undertake a new IFA analysis, or that it was unreasonable for the Officer to refer to the RPD and RAD's IFA findings in assessing the applicants' arguments about hardship.

[23] It is important to recall that the availability of an IFA is an element of the assessment of whether a claimant is a Convention refugee or a person in need of protection. A deferral request is not a new assessment of a refugee claim. There may be facts that are relevant to both the assessment of a refugee claim and a deferral request, but an officer deciding a deferral request is not called upon to decide whether an applicant has an IFA. The refugee claim has already been determined by the IRB.

[24] As to whether or to what extent an IFA determination is "weakened" by the revocation of a jurisprudential guide, this cannot be decided in the abstract. It requires consideration of the decision and the role of the jurisprudential guide in that decision: *Agbeja v Canada (Citizenship and Immigration)*, 2020 FC 781 at paras 77–79; *Sadiq v Canada (Citizenship and Immigration)*, 2021 FC 430 at paras 51–53. The applicants did not file the RAD's decision on this motion, essentially asking the Court to conclude that any decision on an IFA in Nigeria made during the time when the Nigeria Jurisprudential Guide was in force should be reassessed.

[25] At the hearing, the respondent asked the Court to accept a copy of the RAD's decision as part of the record on the motion. Since the RAD's decision was clearly part of the record before the Officer, and since I considered I could not assess the strength of the applicants' arguments without the decision, I accepted the RAD decision as part of the record on this motion. Reviewing that decision makes clear that the RAD's only mentions of the Nigeria Jurisprudential

Guide were in reference to the RPD having relied on it. The RAD's conclusion that the applicants have an IFA in Port Harcourt was based on an independent assessment of the personal and country condition evidence put before it by the applicants. Given the limited reference to the Nigeria Jurisprudential Guide and the fact that the RAD came to its own conclusions on the relevant evidence, I cannot conclude that the revocation of the Nigeria Jurisprudential Guide materially "weakens" the reasoning or conclusions in the RAD's decision: *Agbeja* at paras 77–79; *Sadiq* at paras 51–53.

[26] Further, the Officer in the present case did not simply refer to either the RPD or the RAD's conclusions that there was a viable IFA in Port Harcourt as determinative of the request for deferral. Rather, the Officer addressed the specific allegations of risk and hardship relied on by the applicants, noting that some of the allegations had already been considered by the RPD or the RAD. The Officer concluded the applicants would not be at risk of persecution or risk to their life in Port Harcourt.

[27] The applicants argue the Officer erred in their assessment of the two prongs of the IFA test, namely (1) the existence of a serious possibility of persecution or a likely risk of a section 97 harm; and (2) whether it would be unreasonable in the circumstances for the applicants to relocate to Port Harcourt: *Thirunavukkarasu* at pp 595-97; *Hamdan v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 643 at paras 10-12. However, these arguments assume that the Officer was called on to make an IFA assessment and that they did so. As noted, in my view, the Officer was not required to make a determination about an IFA, and they did not do so. While some of the facts relevant to an IFA analysis may also be relevant to a

request for deferral of removal, this does not mean that a deferral decision should or does undertake a new IFA analysis. In the present case, the Officer referred to the RPD and RAD's IFA findings in assessing the applicants' arguments regarding the risks and hardships they would face if returned to Nigeria. As these were the same risks and hardships put forward in their refugee claim, this was appropriate and reasonable. It does not, however, turn the assessment into an IFA analysis nor require the deferral officer to analyse the two-prong IFA test.

[28] At the oral hearing of this motion, the applicants also argued that the situation in Nigeria had significantly worsened since the RAD's decision in 2019, which explains the revocation of the Nigeria Jurisprudential Guide. They argue the Officer failed to recognize the recent worsening of the situation. However, while some of the evidence the applicants put before the Officer was updated or more recent, the applicants neither pointed the Officer to nor demonstrated to the Court relevant differences between the country condition evidence that was before the RAD and that which was before the Officer. Indeed, the applicants did not materially challenge the Officer's conclusion that much of the evidence the applicants referred to related to areas of Nigeria other than Port Harcourt.

[29] In my view, the applicants have not shown that they have "quite a strong case" that the Officer's decision was unreasonable as failing to show the requisite justification, transparency, and intelligibility: *Baron* at paras 66–67; *Vavilov* at paras 99–101. I therefore cannot accept that the revocation of the Nigeria Jurisprudential Guide raises any serious issue with respect to the Officer's decision or with respect to the Officer's reference to the RPD and RAD decisions.

(b) *There is no serious issue with respect to the Officer's failure to properly consider risk and establishment factors*

[30] The applicants argue the evidence establishes that a single mother with children would be subject to significant hardship and risks to life in Nigeria, and that it would be unreasonable for them to relocate within Nigeria. They argue that the Officer engaged in selective analysis and ignored contradictory evidence.

[31] Notably, a number of the references cited by the applicants before this Court were not drawn to the Officer's attention in their request for a deferral. The Officer reasonably focused their decision on the evidence raised by the applicants in their request, and cannot be faulted for not citing or analysing evidence the applicants did not refer to: *Vavilov* at paras 127–128; *Khan v Canada (Citizenship and Immigration)*, 2020 FC 1101 at para 16.

[32] As the respondent points out, much of the applicants' submission on this issue amounts to an argument that the Officer failed to undertake the appropriate H&C analysis of their hardship and establishment factors. However, as this Court has confirmed, a deferral request is not the occasion on which to conduct a "mini-H&C" assessment: *Newman v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 888 at para 19.

[33] Nor is the fact that an H&C application has recently been filed sufficient on its own to justify a deferral until the application can be determined. In this regard, the Officer's reference to whether the H&C determination was "imminent" is entirely in keeping with the jurisprudence on this issue: *Forde* at paras 40–41.

[34] At the hearing, counsel for the applicants stated that in their recent experience, H&C applications may take well less than the 22 to 36 months referred to by the Officer based on the IRCC website. Counsel referred to instances of decisions being issued in three to six months. I do not doubt counsel's statements of their experience. However, in my view, without evidence that goes beyond the anecdotal, there is no basis to conclude that the Officer's decision was unreasonable. I note in this regard that, as the respondent points out, there was no other evidence put before the Officer to suggest the IRCC's estimates of timing were incorrect or out of date.

[35] The applicants also underscore the difficulties that they will face if required to return to Nigeria, including serious difficulties in finding employment and housing. The Officer expressly considered these issues and the particular circumstances of the applicants. The Officer found that the situation did not amount to one in which the applicants would be exposed to risk of death, extreme sanction, or inhumane treatment.

[36] The applicants have put forward elements of hardship and establishment in Canada that may be relevant on their H&C application. However, an Officer deciding a deferral request is neither deciding an H&C application nor redetermining a refugee claim. Their discretion is limited, and the Officer reasonably assessed the facts and arguments put forward by the applicants in deciding a deferral was not warranted.

[37] Counsel forcefully advocated for a contrary conclusion based on the principal applicant's evidence and the country condition evidence. Despite these submissions, the issue on this motion

is whether the applicants have shown that there is a serious issue that the Officer's exercise of their limited discretion to defer removal was unreasonable. I conclude the applicants have not shown a basis on which there is any realistic likelihood that the factual and discretionary determinations of the Officer would be disturbed on judicial review and there is thus no serious issue to be determined.

IV. Conclusion

[38] As I conclude that the applicants have not demonstrated a serious issue to be determined regarding the reasonableness of the Officer's decision, I need not assess the remaining elements of the test for a stay. The applicants' motion for a stay of removal must be dismissed.

ORDER IN IMM-4120-21

THIS COURT ORDERS that

1. The motion for a stay of removal is dismissed.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4120-21
STYLE OF CAUSE:	ADEBANKE DEBORAH OGUNKOYA ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	JUNE 28, 2021
JUDGMENT AND REASONS:	MCHAFFIE J.
DATED:	JUNE 28, 2021

APPEARANCES:

Linda Kassim	FOR THE APPLICANTS
Stephen Jarvis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lewis & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT