Federal Court  Cour fédérale

Date: 20220923

Docket: IMM-1411-21

Citation: 2022 FC 1222

Ottawa, Ontario, September 23, 2022

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

MARGARET ABEBI FAGBOLA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision of the Refugee Appeal Division of the Immigration and Refugee Board [the "RAD"], dated February 4, 2021 [the "Decision"], which dismissed the Applicant's appeal and upheld the decision of the Refugee Protection Division of the Immigration and Refugee Board [the "RPD"], dated December 3, 2019.

[2] The RPD found that the Applicant was neither a Convention Refugee nor a person in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

II. Background

[3] The Applicant, Margaret Abebi Fagbola, is a 73-year-old citizen of Nigeria.

[4] The Applicant fled Nigeria along with her daughter-in-law and her daughter-in-law's children (the Applicant's grandchildren) for the United States of America on June 30, 2018. They entered Canada on September 30, 2018 and made a refugee claim.

[5] In her claim, the Applicant alleged that her extended family sought to harm her due to her status as a widow accused of witchcraft and as a mother of someone who rejected an offer to become chief.

[6] In a decision dated December 3, 2019, the RPD refused the Applicant's refugee claim (along with those of her daughter-in-law and grandchildren) because of the existence of an internal flight alternative ("IFA"). The RPD found that the city of Port Harcourt was a safe and reasonable IFA. It made the following relevant determinations:

i. The King of Erinmo, who the Applicant alleged was searching for them, did not have the power that would allow him to find them anywhere in Nigeria;

ii. Similarly, a member of the Applicant's extended family who had recently become a police officer did not have the ability to locate them;

iii. The Applicant's banking verification number could not be used to track them;

iv. The Applicant would be relocating with the other refugee claimants;

v. The Applicant and her fellow claimants would be able to find work and accommodation in Port Harcourt, despite not being indigenous to the city.

[7] The Applicant along with the other claimants appealed the RPD decision to the RAD. In a decision dated February 4, 2021, the RAD dismissed the appeal and upheld the decision of the RPD. It is this decision that the Applicant challenges.

[8] This application for judicial review began on behalf of all of the refugee claimants; however, the Applicant's daughter-in-law and grandchildren withdrew from the matter as they were granted permanent residence through a special program introduced during the COVID-19 pandemic, which gave healthcare workers a pathway to permanent residency. They applied through this program in January 2021.

[9] The Applicant seeks an order setting aside the Decision and remitting the matter for reconsideration by a different RAD panel or an order requiring the RAD to confer refugee status.

III. Decision Under Review

[10] Upon appeal to the RAD, the Applicant sought for the tribunal to consider new evidence pursuant to subsection 110(4) of the *IRPA*. This included:

i. Articles about the King of Erinmo;

ii. A report from a lecturer that spoke to the viability of Port Harcourt as an IFA:

iii. Evidence about COVID-19 in Port Harcourt;

iv. The Applicant's driver's licence and renewal application;

v. Email communications between the Applicant's daughter-in-law and the Applicant's son's brother-in-law, Mr. Osobajo that allege that police in Lagos searched Mr. Osobajo's home in search of the Applicant after locating Mr. Osobajo through his bank records and driver's license. The police supposedly suspected the Applicant's daughter-in-law of kidnapping her own children.

[11] The RAD admitted all of this evidence, save for the email communications. It found that, though the source of the evidence was authentic, the story had been fabricated to conveniently plug the following holes that the RPD had found with the Applicant and the other refugee claimant's story:

i. That a member of the Applicant's extended family, who had recently become a member of the police force did not have the power or means to locate them;

ii. That they could not be tracked through their banking information;

iii. That the Applicant and her fellow claimants were not criminally wanted.

[12] The RAD further commented on the substance of the events alleged in the emails and found them to be incredulous. The RAD found it was unclear who would be making the accusation of kidnapping. The RAD also noted that it was unlikely police officers would reveal to Mr. Osobajo their investigative technique of locating him through his bank records and driver's license. In addition, the RAD found it odd that they would visit Mr. Osobajo, a member of the ex-husband's extended family, instead of one of the daughter-in-law's family members.

[13] The RAD also did find that an oral hearing concerning this evidence was necessary. It found that the new evidence did not raise a serious issue respecting the credibility of the Applicant or her fellow claimants.

[14] The RAD then moved to address the merits of the appeal. It found no error with the RPD's IFA analysis. It made the following findings relevant to this judicial review:

i. The RPD did not err when it did evaluated the possibility of an IFA for the refugee claimants collectively, rather than evaluating the Applicant's case independently;

ii. The RPD did not err in concluding the King of Erinmo is not a state actor in the same way a government official or military personnel would be. There is no evidence that his power and influence extend beyond a small region;

iii. The Applicant failed to point out how agents of persecution would locate her by using her driver's license and renewal forms;

iv. The Applicant would likely be entitled to some government support, such as old age pension, which is available to those over 50.

[15] Consequently, the RAD dismissed the appeal.

IV. Issues

A. *Was the RAD's decision unreasonable?*

B. *Did the RAD breach the duty of procedural fairness?*

V. Standard of Review

[16] The standard of review of this decision is that of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, [*Vavilov*] 2019 SCC 65 at paragraph 2). Other than the issue relating to procedural fairness, which is reviewed on a standard of correctness or a standard with the same import (*Canadian Pacific Railway Company v Canada (Attorney General),* 2018 FCA 69 at paragraphs 34 to 35 and 54 to 55, citing *Mission Institution v Khela,* 2014 SCC 24 at paragraph 79).

VI. Analysis

A. *Was the RAD's Decision Reasonable?*

[17] The Applicant argues that the RAD's decision was unreasonable on several fronts. First, she contends that the RAD should have admitted the fresh evidence consisting of the emails between Mr. Osobajo and the Applicant's daughter-in-law under subsection 110(4), or at least have held an oral hearing pursuant to subsection 110(6) (see *IRPA*, ss 110(4), 110(6)). Second, she alleges several errors in the RAD's IFA analysis.

[18] The Respondent disputes this. They claim that the RAD was reasonable to reject the Applicant's evidence and oral hearing and committed no error in its IFA analysis.

[19] The RAD was under no obligation to accept the Applicant's evidence or to convene an oral hearing. The only explicit requirements for the RAD to accept evidence under subsection 110(4) of the *IRPA* are:

i. The evidence arose after the rejection of an applicant's claim;

ii. The evidence was not reasonably available prior to the rejection of the applicant's claim;

iii. Or if an applicant could not reasonably have been expected to have presented the evidence at the time of rejection.

[20] However, on top of these explicit criteria, there are four implicit considerations (*Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at paragraph 13, endorsed in the refugee appeal context in *Singh v Canada (Citizenship and Immigration)*, 2016 FCA 96 [*Singh*] at paragraphs 38 and 44). These implicit criteria include, among other factors, considering the

credibility of evidence, considering the source and the circumstances in which it came into existence.

[21] The RAD reasonably reviewed the circumstances in which the email arose – between the RPD decision and the appeal, remedying problems expressed by the RPD about the Applicant's claim – and concluded against considering it.

[22] The Applicant argues that there is a presumption of validity that attaches to documents issued by foreign governments (*Chen v Canada*, 2015 FC 1133 at paragraph 10). She claims this applies in the present case to the Applicant's email evidence because Mr. Osobajo's affidavit submitted along with the emails is a public document.

[23] This claim has no merit. The RAD did not find the emails or affidavit to be inauthentic and, in any event, the emails are clearly not documents issued by a foreign public authority, so no such presumption attaches to them.

[24] Moreover, it was reasonable for the RAD to conclude against holding an oral hearing. An oral hearing is not required under subsection 110(6) of the *IRPA* because the RAD finds new evidence to be lacking in credibility. Rather it is when the RAD finds that otherwise credible evidence raises "a serious issue" about the general credibility of an applicant that a hearing is warranted (*Singh* at paragraph 44). The RAD reasonably found that not to be the case here.

[25] I also do not agree that the RAD committed any errors in its IFA analysis. The RAD was reasonable in its treatment of the King's level of power and influence, the ability for agents of persecution to track the Applicant through information on her driver's license and the viability of Port Harcourt as an IFA in terms of accommodation and employment.

[26] Furthermore, the Applicant alleges that the RAD erred by assuming that the Applicant would be travelling to Port Harcourt with the other refugee claimants, her daughter-in-law and grandchildren. They submit that this is especially so because the other claimants have now acquired permanent residency.

[27] A reviewing court is bound to the same record as that which was before the administrative decision-maker, absent certain limited exceptions, which are not in play here. In light of that record, the RAD's decision on this front was reasonable.

B. *Did the RAD breach the duty of procedural fairness?*

[28] As stated, the Applicant and her fellow refugee claimants applied for permanent residency through a special program for healthcare workers during the COVID-19 pandemic. The Immigration, Refugees and Citizenship Canada (the "IRCC") sent a letter confirming receipt of this application on February 2, 2021. The Applicant sent a letter, dated February 8, 2021, to the Immigration and Refugee Board (the "IRB") requesting that the refugee appeal be held in abeyance pending the outcome of the permanent residence application. The RAD decided the appeal on February 4, 2021 and communicated the decision to the Applicant by notice dated February 10, 2021.

[29] The Applicant argues that the RAD should not have decided the case in keeping with a practice notice from the IRB. The notice advises that that upon notification by the IRCC that a refugee appellant that has perfected their appeal at the RAD and has made a permanent residence application under the healthcare worker program, the RAD would stop processing the appeal pending the outcome of the application.

[30] In some cases, tribunal guidelines can create legitimate expectations, the violation of which would constitute a breach of the duty of procedural fairness (*Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paragraphs 94 to 95).

[31] However, I do not believe this notice created legitimate expectations that the RAD breached in this case; the RAD was not required to defer its decision. There is no indication the RAD was aware of the pending permanent residence application. The IRCC letter confirming receipt of this application was dated just two days before the RAD decision was made. The Applicant's letter notifying the IRB of the application is dated after the RAD had already decided the case.

[32] Additionally, as the Respondent points out, the practice notice in question does not place a hold on decisions where "in the discretion of the RAD, substantive work has begun on the appeal before the RAD was notified by the IRCC or the appellant that an application was made". Accordingly, even if the IRCC did immediately notify the RAD, if substantive work had begun, the RAD was entitled to decide the appeal. It is a reasonable inference from the facts here that substantive work had certainly been done prior to February 4, 2021.

VII. Conclusion

[33] For the reasons above, the application for judicial review is dismissed.

JUDGMENT in IMM-1411-21

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. There is no question as to certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1411-21
STYLE OF CAUSE:	MARGARET ABEBI FAGBOLA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEO CONFERENCE
DATE OF HEARING:	SEPTEMBER 21, 2022
JUDGMENT AND REASONS:	MANSON J.
DATED:	SEPTEMBER 23, 2022

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