Federal Court  Cour fédérale

Date: 20220603

Docket: IMM-1943-21

Citation: 2022 FC 820

Ottawa, Ontario, June 3, 2022

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

OLAOLUWA IGE AREGBESOLA
TITILAYO ADEFISOLA AREGBESOLA
GEORGE EYITAYO AREGBESOLA
EUNIC ADYOADE AREGBESOLA

Respondents

JUDGMENT AND REASONS

I. Overview

[1] The Respondents are citizens of Nigeria and a family of two adults and two minor children. They fled Nigeria and claimed refugee protection in Canada because they fear the Fulani Herdsmen who targeted them over a land dispute.

[2] The Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] found that the Respondents have a viable internal flight alternative [IFA] in Port Harcourt. The Refugee Appeal Division [RAD] of the IRB admitted the Respondents' new evidence (which involved primarily two articles about the same event involving the Fulani Herdsmen reportedly abducting and killing a political candidate from Port Harcourt) and allowed their appeal, finding them to be Convention refugees. Specifically, the panel found that the Respondents were credible, and they face a serious possibility of persecution throughout Nigeria based on the admitted evidence.

[3] The Applicant seeks judicial review of the RAD decision and raises the issues of the RAD's admission of evidence, contrary to subsection 110(4) of *the Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], and the reasonableness of the finding that Port Harcourt is not a viable IFA for the Respondents. See Annex "A" for the relevant legislative provisions.

[4] There is no dispute that the presumptive reasonableness standard of review is applicable to both issues: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 25, 65-66; *Singh v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1022 [*Singh*] at paras 36-42; *Qaddafi v Canada (Citizenship and Immigration)*, 2016 FC 629 at para 19. I find that none of the situations that could rebut this standard of review arises in the circumstances: *Vavilov*, at para 17.

[5] Having considered the record before the Court, including the parties' written and oral submissions, as well as the applicable law, I find that the RAD decision to admit the

Respondents' new evidence on appeal was not justified in the context of the applicable legal framework and that doing so, rendered the RAD decision regarding the unviability of the IFA unreasonable. For the more detailed reasons below, I thus allow this application for judicial review.

II. Analysis

A. *RAD's admission of Respondents' evidence is unreasonable*

[6] I find that the RAD erred in its determinations that the Respondents' new evidence was not reasonably available and that they could not have been reasonably expected in the circumstances to have presented the evidence at the time of the RPD decision. Contrary to the Respondents' submission, this is not a question of the Applicant asking the Court to reweigh the new evidence but rather the issue is one of whether the RAD's assessment was reasonable in the circumstances with regard to the applicable legal framework.

[7] In my view, the RAD's decision demonstrates that the RAD understood the test for the admission of new evidence under the *IRPA* s 110(4) but misapplied it. As the Federal Court of Appeal guides, the admissibility conditions described in the *IRPA* s 110(4) are inescapable and leave no room for discretion on the part of the RAD. Further, the provision must be interpreted narrowly because it departs from the general principle that the RAD proceeds without a hearing on the basis of the record that was before the RPD: *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 35.

[8] In addition, the institutional context matters in that the reasonableness of the RAD's decision depends on an internally coherent and rational chain of analysis that is justified in relation to the applicable facts, including the history of the proceedings, and law, that constrain the decision maker: *Vavilov*, above at paras 85, 91. I find that here, such coherence is lacking for several reasons.

[9] The admitted articles were not new temporally; they pre-dated the RPD hearing by about 6 months. Yet, the RAD admitted them on the basis that they were not reasonably available and could not have been reasonably expected in the circumstances to have been available. The RAD acknowledged that the Respondents could have anticipated the determinative issue of an IFA. I am satisfied that the RAD erred, however, in admitting the evidence on the bases that the Respondents were not notified before the RPD hearing that Port Harcourt would be considered as a potential IFA, and the RPD rendered its decision quickly. In my view, the RAD also erred in concluding that the evidence was admissible because the RPD did not accept the Respondents' evidence at the hearing about their safety in Port Harcourt even though they were considered credible on all other issues.

[10] I find that the RAD conflated the issue of whether the articles could not have been reasonably expected in the circumstances to have been available with whether they in fact were reasonably available, resulting in a lack of justification for the latter finding. The articles were located online. The Respondent, Olaoluwa Aregbesola, who swore the affidavit through which the articles were submitted to the RAD, admitted that his research before his refugee hearing was not thorough and that he could have discovered and submitted the articles as evidence prior to

the hearing. Because the RAD provided no reasons why, in light of such admission, the articles were not reasonably available, this represents a lack of justification, in my view, for this particular finding by the RAD.

[11] Regarding the issue of whether the articles could not have been reasonably expected in the circumstances to have been available, I agree with the Applicant that there is no obligation on the RPD to raise the IFA issue before the RPD hearing; the issue is inherent in the claim for protection: *Rasaratnam v Canada (Minister of Employment & Immigration)*, 1991 CarswellNat 162 [*Rasaratnam*] at para 9, [1991] FCJ No. 1256; *Figueroa v Canada (Citizenship and Immigration)*, 2016 FC 521 [*Figueroa*] at para 25. In other words, claimants must anticipate it, and be prepared to provide evidence and make submissions at the hearing, if the RPD expressly raises the issue, as occurred here: *Rasaratnam*, at para 12. Hence, the claimants have the onus to put forward their best case for protection: *Figueroa*, at para 20: *Cabdi v Canada (Citizenship and Immigration)*, 2016 FC 26 at para 24.

[12] In addition, the RAD provided no rationale for the conclusion that a period of 34 days from the hearing until the RPD issued its decision is "quick" which in my view is unintelligible in the context of the institutional setting and the circumstances of this matter. Specifically, subsection 10(8) of the *Refugee Protection Division Rules*, SOR/2012-256, stipulates that the RPD must provide an oral decision and reasons at the hearing, unless it is not practicable to do so. This gap is to be contrasted, for example, with the period of three days at issue, from the occurrence of a relevant event just days after the hearing until the RPD issued its decision eight days after the hearing, in *Ogundipe v Canada (Citizenship and Immigration)*, 2016 FC 771 at

paras 26-27. It is not disputed that the articles here pre-date the PRD hearing by about 6 months and that the Respondents had an additional month following the hearing to locate and apply to submit them. The absence of an explanation why, in the circumstances, the RAD considered the 34-day period quick is unintelligible.

[13] Further, I find that the RPD was concerned about the sufficiency of evidence to establish the Herdsmen could locate the Respondents in Port Harcourt, rather than the Respondents' credibility. The RPD did not disbelieve their allegation that the Herdsmen located them in Lagos. The Respondents, however, were not sure how they were located. On that basis, the RPD held the fact that they were located in Lagos previously is not enough to establish that the Herdsmen could locate the Respondents in Port Harcourt.

[14] In sum, I am satisfied that the RAD's reasons for admitting the Respondents' evidence do not "add up", rendering the decision unreasonable: *Vavilov*, above at para 104. While I find these errors sufficient to dispose of the judicial review application, I turn briefly to the issue of whether the RAD's finding that the IFA is not viable is unreasonable.

B. *RAD's finding that IFA unviable is unreasonable*

[15] The Respondents argue that, even if the RAD wrongly admitted the evidence in issue, by notionally deleting paragraph 20 from the decision where the RAD examines the evidence and determines its impact, the decision nonetheless remains transparent and justified. I cannot agree. The Supreme Court pointedly cautions that, "it is not open to a reviewing court to disregard the

flawed basis for a decision and substitute its own justification for the outcome": *Vavilov*, above at para 96 (citing *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 SCR 6, at paras 26-28).

[16] I agree with the Applicant that, because the RAD relied on the unreasonably admitted articles in concluding that Port Harcourt is not a viable IFA for the Respondents, it is unknowable whether the RAD would have come to the same conclusion in the absence of such evidence, and thus, warrants the Court's interference. For the same reason, in my view, the Court cannot know what rationale the RAD would provide to support its conclusion absent the admitted evidence. In the circumstances, I find it unnecessary to address the parties' other submissions regarding this issue that include, in my view, requests to reweigh evidence which is not the role of the Court: *Vavilov*, above at para 125.

III. Conclusion

[17] For the above reasons, I conclude that the RAD's decision on the whole is unreasonable, and thus, I grant the Applicant's judicial review application. The decision will be set aside and the matter will be remitted to a different panel for redetermination.

[18] No party proposed a serious question of general importance for certification and I find that none arises in the circumstances.

JUDGMENT in IMM-1943-21

THIS COURT'S JUDGMENT is that:

1. The Applicant's judicial review application is granted.
2. The February 24, 2021 decision of the Refugee Appeal Division, as amended on February 26, 2021, is set aside.
3. This matter is to be remitted to a different panel of the Refugee Appeal Division for redetermination.
4. There is no question for certification.

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**
***Loi sur l'immigration et la protection des réfugiés* (L.C. 2001, ch. 27)**

Appeal to Refugee Appeal Division
Appeal

110 (1) Subject to subsections (1.1) and (2), a person or the Minister may appeal, in accordance with the rules of the Board, on a question of law, of fact or of mixed law and fact, to the Refugee Appeal Division against a decision of the Refugee Protection Division to allow or reject the person's claim for refugee protection.

Evidence that may be presented

(4) On appeal, the person who is the subject of the appeal may present 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.

Appel devant la Section d'appel des réfugiés
Appel

110 (1) Sous réserve des paragraphes (1.1) et (2), la personne en cause et le ministre peuvent, conformément aux règles de la Commission, porter en appel — relativement à une question de droit, de fait ou mixte — auprès de la Section d'appel des réfugiés la décision de la Section de la protection des réfugiés accordant ou rejetant la demande d'asile.

Éléments de preuve admissibles

(4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

***Refugee Protection Division Rules* (SOR/2012-256)**
***Règles de la Section de la protection des réfugiés* (DORS/2012-256)**

Conduct of a Hearing
Oral decision and reasons

10 (8) A Division member must render an oral decision and reasons for the decision at the hearing unless it is not practicable to do so.

Déroulement d'une audience
Décision de vive voix et motifs

10 (8) Le commissaire de la Section rend une décision et donne les motifs de la décision de vive voix à l'audience, à moins qu'il ne soit pas possible de le faire.

FEDERAL COURT

SOLICITORS OF RECORD

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