Federal Court Cour fédérale

**Date: 20200702**

**Docket: IMM-5726-19**

**Citation: 2020 FC 742**

**Ottawa, Ontario, July 2, 2020**

**PRESENT: Madam Justice Walker**

**BETWEEN:**

**GBENGA ONIGBINDE AKINKUNMI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

[1] Mr. Gbenga Akinkunmi is a citizen of Nigeria who claimed asylum in Canada in 2018. The Refugee Protection Division (RPD) rejected his claim, finding that Mr. Akinkunmi has an internal flight alternative (IFA) in Benin City, Nigeria. Mr. Akinkunmi appealed the RPD's decision to the Refugee Appeal Division (RAD). The RAD dismissed the appeal and confirmed the RPD's IFA finding. Mr. Akinkunmi now seeks the Court's review of the RAD's decision (Decision).

[2] Mr. Akinkunmi's application is dismissed because the RAD thoroughly and coherently addressed the issues before it. The RAD justified each of its findings with reference to the RPD's decision, the evidence in the record and Mr. Akinkunmi's appeal submissions.

## I. Background

[3] Mr. Akinkunmi fled Nigeria in 2018 because he feared: (1) retribution from Fulani Herdsmen and Boko Haram for challenging the Herdsmen's right to graze their animals close to his property in Plateau State; (2) persecution by the Delta Niger Militants (Militants) who had kidnapped him during his move to the south-east of Nigeria following two violent incidents involving the Herdsmen, and who had received only part of the ransom demanded; and (3) the threat that his family would force female genital mutilation (FGM) on his six-year old daughter.

[4] Mr. Akinkunmi flew to New York, NY on March 11, 2018 using a valid U.S. visa. His wife and two children remained in Nigeria. They had left Plateau State and have lived separately from Mr. Akinkunmi since the incidents with the Herdsmen. Mr. Akinkunmi entered Canada on March 12, 2018. His refugee claim was considered and rejected by the RPD in February 2019.

[5] The RPD considered both prongs of the test for an IFA, noting that Mr. Akinkunmi feared persecution or harm at the hands of non-state actors. The panel concluded that he would not be at risk in Benin City from the Fulani Herdsmen, Boko Haram or the Militants, and that there was no credible evidence that Mr. Akinkunmi, his wife or his daughter had been harassed or pursued by Mr. Akinkunmi's family since 2017. With respect to the second prong of the IFA test, the RPD determined that it was not objectively unreasonable for Mr. Akinkunmi to seek

refuge in Benin City in light of his level of education, work experience and linguistic ability, and his ability to find work.

## II. Decision under review

[6] On appeal to the RAD, Mr. Akinkunmi challenged a number of aspects of the RPD's IFA analysis. The RAD reviewed each of Mr. Akinkunmi's appeal submissions against the two-pronged test set out in *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (CA) (*Rasaratnam*).

[7] The RAD first considered whether the evidence indicated that any of the Fulani Herdsmen, Boko Haram, Militants or Mr. Akinkunmi's family had the means and motivation to pursue him in Benin City. The panel concluded that there was no persuasive evidence establishing that the Fulani Herdsmen and Boko Haram would be motivated to search for Mr. Akinkunmi outside of his home region. Further, neither the Herdsmen nor Boko Haram were sufficiently organized or powerful to have the means to find and harm their enemies in a large urban area such as Benin City.

[8] The RAD then addressed Mr. Akinkunmi's argument that the RPD erred in finding that he faced no forward-looking risk of harm from the Militants in Benin City. The RAD panel found that Benin City was not near the kidnapping site; that the Militants had no significant presence in the city; and that the objective National Documentation Package (NDP) evidence indicated that the Militants primarily targeted oil facilities. The RAD also found that

Mr. Akinkunmi had provided no evidence to support his assertion that the Militants were motivated to search for him to secure the remainder of his kidnapping ransom.

[9] With respect to fear of FGM of his daughter, the RAD agreed with the RPD, echoing the RPD panel's finding of no credible evidence of threat or harm from Mr. Akinkunmi's family. The RAD stated that it was mere speculation that he could be found by his family in Benin City where he had no known family members or connections. The panel noted Mr. Akinkunmi's submission that the RPD ignored evidence that his wife had moved from place to place with their daughter to avoid FGM. The RAD determined that the RPD considered the issue but had found that the evidence did not establish Mr. Akinkunmi's central allegation of persecution in Benin City due to his opposition to FGM.

[10] The RAD considered the second prong of the *Rasaratnam* IFA test at some length and confirmed the RPD's assessment that it would not be objectively unreasonable or unduly harsh to expect Mr. Akinkunmi to relocate to Benin City. The panel's findings are not contested in this application. However, Mr. Akinkunmi now submits that it would be unreasonable to require him to cease all contact with his extended family should he return to Nigeria and live in the IFA. He states that his family would inevitably learn of his relocation to Benin City, placing his daughter at risk.

## III. Issues and Standard of Review

[11] The issue in this application is whether the RAD erred in concluding that Mr. Akinkunmi has a viable IFA in Benin City. Mr. Akinkunmi contests two aspects of the RAD's IFA assessment:

1. Mr. Akinkunmi's continued risk of persecution by the Militants in Benin City.
2. The risk to Mr. Akinkunmi's daughter of FGM in Benin City.

[12] Mr. Akinkunmi does not challenge the RAD's conclusions regarding the Fulani Herdsmen and Boko Haram.

[13] The parties submit and I agree that the RAD's IFA determination is subject to review by this Court for reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10 (*Vavilov*)). None of the situations identified by the Supreme Court of Canada (SCC) in *Vavilov* for departing from the presumptive standard of review apply in this case.

[14] The majority in *Vavilov* set out guidance for reviewing courts in the application of the reasonableness standard. I have applied that guidance in my review, exercising restraint but conducting a robust review of the Decision for justification and internal coherence (*Vavilov* at paras 12-15, 85-86, 99; see also *Canada Post Corp. v Canadian Union of Postal Workers*, 2019 SCC 67 at paras 28-29). In oral argument, the parties emphasized the importance of the decision actually made by the decision maker and the constraints within which the decision maker must act, echoing the SCC's description of a reasonable decision as one "that is based on an internally

coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85).

## IV. Analysis

### *1. Did the RAD err in its assessment of Mr. Akinkunmi's continued risk of persecution by the Militants in Benin City?*

[15] Mr. Akinkunmi submits that the RAD unreasonably rejected his submission that he faces a forward-looking risk in the IFA of a second kidnapping by the Militants. First, he argues that Benin City is too close to Warri, the site of Mr. Akinkunmi's 2018 kidnapping. Second, he argues that the RAD ignored the presumption of fact that he faces a serious possibility of future persecution or harm as a result of his first kidnapping and failure to pay the full ransom amount.

[16] I acknowledge that Mr. Akinkunmi questions the coherence of certain paragraphs in the Decision, arguing they lack clarity and should be viewed by the Court as determinative errors in the RAD's reasoning. Mr. Akinkunmi's criticisms are not persuasive. He has excerpted portions of paragraphs from the Decision and relies on his analysis of those excerpts to undermine the RAD's assessment of the Militants' means and motivation to locate him in Benin City. This approach ignores the SCC's guidance to reviewing courts that an administrative decision maker's written reasons must be read holistically and contextually (*Vavilov* at para 97). Other than the RAD's one reference to the Niger Delta Avengers rather than the Militants, which was an error, the RAD's analysis of the scope of the Militants' activities in the south of Nigeria were well-reasoned and logical. Despite Mr. Akinkunmi's insistence, the RAD's incorrect reference to the Avengers does not vitiate the Decision.

*Proximity of Benin City to Warri*

[17] In arguing that the proposed IFA is too close to the site of his kidnapping, Mr. Akinkunmi submits that the RAD's reliance on the fact that Benin City is a two-hour car trip (97 km) from Warri ignores a series of cases from this Court that focus on the difficulty of finding a viable IFA or establishing state protection in a small country (*Annan v Canada (Minister of Citizenship and Immigration)*, [1995] 3 FC 25 (*Annan*); *Corneau v Canada (Citizenship and Immigration)*, 2011 FC 722 (*Corneau*); *Henriquez de Umaña v Canada (Citizenship and Immigration)*, 2012 FC 326 (*Henriquez de Umaña*); *James v Canada (Citizenship and Immigration)*, 2015 FC 1279 (*James*)). He draws an analogy from those cases to the short distance between Benin City and Warri.

[18] Mr. Akinkunmi also submits that the RAD did not approach the question of proximity from the perspective of the alleged agents of persecution. He states that the RAD failed to address the question of whether the Militants would consider Benin City too far from Warri to pursue Mr. Akinkunmi for payment.

[19] I have reviewed the cases cited by Mr. Akinkunmi. The determinative issue before the Court in *Corneau* and *James* was state protection, not IFA. The Court's emphasis on the size of Saint Lucia in both cases responded to arguments of a localized inability and/or refusal by state authorities to protect victims of domestic violence. In *Henriquez de Umaña*, the Court criticized the RPD's rejection of the applicant's evidence regarding a possible IFA. The Court found that the RPD panel failed to explain why it rejected evidence that the applicant's agent of persecution was well organized and would be able to locate him anywhere in El Salvador. The physical size

of El Salvador was important but was considered in conjunction with the persecutor itself and its reach throughout the country. In *Annan*, another IFA case, the Court determined that the applicant was at risk throughout Ghana. The Court stated that the size of the country had to be taken into account as did its cultural foundations which were still largely tribal.

[20] I agree with Mr. Akinkunmi that geography and distance are important in IFA cases but they are rarely the only consideration before a decision maker. In each case, the decision maker must consider all relevant evidence regarding the serious possibility of harm to an applicant in the proposed IFA, including the characteristics of the particular alleged agent of persecution and its ability and motivation to take action in the IFA. I find that the RAD did not ignore the issue of geography. Rather, the panel considered distance as one component of its analysis of the likelihood the Militants would search for Mr. Akinkunmi in Benin City.

[21] The remainder of the RAD's analysis focussed on the Militants themselves and whether they had the means and motivation to pursue Mr. Akinkunmi in Benin City. The panel's assessment of the Militants' means and motivation necessarily proceeded from their perspective, effectively asking whether the Militants could or would seek Mr. Akinkunmi despite his location two hours from Warri. The RAD stated that the Militants were not present in any significant way in Benin City, in Edo State. The NDP documentation indicated that they operate mainly in Delta State, the presumed location of their base camp, and that they are primarily focussed on targeting oil facilities and not people. These factors indicated that the Militants had neither the ability nor the means to mount a search in Benin City.

[22] The RAD made a final but critical factual finding. Mr. Akinkunmi had provided no evidence to support his argument that the Militants were motivated to search for him to recoup the remainder of the kidnapping ransom. The record supports the RAD's finding. In addition, Mr. Akinkunmi was asked repeatedly by the RPD for all the reasons he feared returning to Nigeria. At no point did he state that he feared his former kidnappers. Mr. Akinkunmi argues that he did not think he needed to repeat the information contained in his Basis of Claim (BOC) form but his position is not tenable. The RPD was clear in the questions posed and the RAD drew a reasonable inference from his omission to make any reference to the Militants. The RAD stated:

> [35] [Mr. Akinkunmi] has not provided any evidence to support his assertion on appeal that the kidnappers are motivated to search for him to secure the remainder of the kidnapping ransom. He did not testify to ongoing threats or harassment at his RPD hearing, nor is there information in his BOC which indicates that the kidnappers have sought him in any way since the incident took place. [Mr. Akinkunmi] did not testify at his hearing to concerns that his previous kidnappers were motivated to harm him due to the ransom amount outstanding. …

[23] Mr. Akinkunmi's focus on the distance between Benin City and Warri ignores significant parts of the RAD's analysis of the possibility that the Militants would pursue payment of the remaining ransom and cause him further harm.

[24] I find that the RAD's analysis of Benin City as an IFA where the Militants were unlikely to pursue Mr. Akinkunmi was detailed and coherent. The panel provided clear justification for its findings. The RAD's conclusion that Mr. Akinkunmi's fear of harm from the Militants in Benin City had no objective basis was reasonable.

*Existence of a presumption of fact due to past kidnapping*

[25] I turn to Mr. Akinkunmi's submission that his 2018 kidnapping and failure to pay the full ransom to the Militants gives rise to a presumption of fact that he is at risk of re-kidnapping should he be required to return to Nigeria and live in Benin City. He argues that the RAD erred in requiring him to provide evidence of his fear of the Militants' likely future conduct. Mr. Akinkunmi relies on the Federal Court of Appeal (FCA) decision in *Fernandopulle v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 91 (*Fernandopulle*). He submits that the FCA rejected the existence of a presumption of law based on past persecution but did not reject the existence of a presumption of fact stemming from that persecution. Mr. Akinkunmi argues that the presumption of fact that he is at risk of re-kidnapping "requires at least a fact to rebut the presumption". The passage cited by Mr. Akinkunmi reads in part as follows (*Fernandopulle* at para 25):

> A person establishes a refugee claim by proving the existence of a well-founded fear of persecution for one of the reasons listed in section 96 of the *Immigration and Refugee Protection Act*. Proof of past persecution for one of the listed reasons may support a finding of fact that the claimant has a well-founded fear of persecution in the future, but it will not necessarily do so.

[26] The FCA's language does not establish a presumption of fact of future harm that must be rebutted by proof to the contrary. The Court simply recognized that a prior violent or harmful incident may be a factual element in establishing forward-looking risk. I note also that the FCA was focussed on the existence of past persecution based on one of the grounds enumerated in section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA). Mr. Akinkunmi's case rests on section 97 of the IRPA and the possibility of future harm by a specific non-state actor. Finally, the cases cited by Mr. Akinkunmi in support of his proposition

do not reflect the Court's adoption of a presumption of fact based on prior harm. In each case, the Court's analysis was based on the particular applicant's claim, factual evidence of past persecution or harm, and relevant country conditions.

[27] I find that Mr. Akinkunmi's reliance on a presumption of fact premised on his prior kidnapping and his argument that the Respondent was required to rebut that presumption with evidence, is an attempt to reverse the onus he bore to establish that Benin City is not a viable IFA (*Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589).

*2. Did the RAD err in its assessment of the risk to Mr. Akinkunmi's daughter of FGM in Benin City?*

[28] Mr. Akinkunmi challenges the RAD's conclusion that the RPD did not ignore evidence that his wife and daughter had moved a number of times within Nigeria due to fear of Mr. Akinkunmi's family.

[29] I have reviewed the Decision and the RPD's decision in light of Mr. Akinkunmi's argument. The RAD agreed with the RPD's finding that there was no credible evidence to establish, on a balance of probabilities, that Mr. Akinkunmi and his wife and daughter had been persecuted or threatened by his family or that the feared family members had been able to locate them since 2017. It is clear from the RPD decision that the RPD panel considered the evidence in the record that Mr. Akinkunmi's wife and daughter had moved as a precaution to avoid his family. The RAD made no reviewable error in stating that the RPD considered the family's relocations within Nigeria.

[30] Mr. Akinkunmi submits that Benin City is not a reasonable IFA for him because his daughter would be placed at risk of FGM as either: (1) his wife and daughter would join him in Benin City and his family would inevitably learn that they were living in the city; or (2) he would have to remain separated from his wife and daughter to ensure the daughter's safety. He argues that the RAD misunderstood this aspect of his appeal submissions and that both scenarios demonstrate that it would be unreasonable to expect him to relocate to Benin City.

[31] The RAD found that it was mere speculation that Mr. Akinkunmi could be found in Benin City by his family as he had no known family or familial connections there. He does not challenge this finding other than to insist that his discovery by family members by indirect means is inevitable. I find that the RAD did not err in stating that this evidence is speculative. It does not satisfy the very high evidentiary threshold for establishing that an IFA is unreasonable (*Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164 at para 15).

[32] Mr. Akinkunmi now states that he would communicate with his family if he returned to Nigeria and that it would be an unreasonable hardship to expect him to cut off all ties to his family. Therefore, his family would learn from him that his daughter was living in Benin City. This argument was not made as part of the appeal submissions to the RAD. Further, it contradicts Mr. Akinkunmi's statement in his BOC that he and his wife have vowed to protect his daughter's rights "at any cost above any tradition or family relationship". Mr. Akinkunmi's late statement that he would contact his family once in Nigeria also undermines his alleged fear of forced FGM. I agree with the Respondent's submission that a requirement to cut ties with family in order to be

able to reunite with his wife and daughter and to ensure his daughter's safety does not meet the threshold for establishing an IFA as unreasonable.

## V. Conclusion

[33] The application is dismissed.

[34] No question for certification was proposed by the parties and none arises in this case.

**JUDGMENT IN IMM-5726-19**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"Elizabeth Walker"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-5726-19 |
| **STYLE OF CAUSE:** | GBENGA ONIGBINDE AKINKUNMI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | HELD BY VIDEOCONFERENCE BETWEEN WINNIPEG, MANITOBA AND OTTAWA, ONTARIO |
| **DATE OF HEARING:** | APRIL 28, 2020 |
| **JUDGMENT AND REASONS:** | WALKER J. |
| **DATED:** | JULY 2, 2020 |

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| Alexander Menticoglou | FOR THE RESPONDENT |

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