Federal Court  Cour fédérale

Date: 20210628

Docket: IMM-2225-20

Citation: 2021 FC 677

Ottawa, Ontario, June 28, 2021

PRESENT: Madam Justice Pallotta

BETWEEN:

BOLUWAJI EMMANUEL FAGITE
DAVID AYOMIDE FAGITE
ELIJAH TEMILOLUWA FAGITE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Boluwaji Emmanuel Fagite and his children, David Ayomide Fagite and Elijah Temiloluwa Fagite, are citizens of Nigeria who allege a fear of persecution by Mr. Fagite's family and community elders for refusing to allow the children to undergo dangerous rituals. This application relates to a decision of the Refugee Appeal Division (RAD), confirming the

Refugee Protection Division's (RPD) decision and rejecting the applicants' claims for refugee protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] on the basis that they have viable internal flight alternatives (IFA) in Port Harcourt and Benin City.

[2] David Ayomide Fagite, Elijah Temiloluwa Fagite and their mother made an application to the RAD to separate and re-open their RAD appeal. Their request was granted. The RAD allowed the appeal and referred the matter to the RPD for re-determination under s. 111(1)(c) of the *IRPA*. As a result, the parties agree that this application for judicial review is now moot insofar as it relates to the children.

[3] Mr. Fagite submits the RAD's IFA determination is unreasonable. He submits the RAD committed a reviewable error in relying on a jurisprudential guide for Nigeria, Decision TB7-19851 (the Jurisprudential Guide or JG) that was later revoked. Furthermore, he submits the RAD erred in finding that the agents of persecution do not have the motivation, reach or influence to locate and harm him in Port Harcourt or Benin City, and in dismissing psychological evidence and failing to consider his emotional state in assessing whether it would be reasonable to relocate there. Also, Mr. Fagite submits that the RAD erred by failing to consider whether his claim has a nexus to a Convention ground of persecution under section 96 of the *IRPA*.

[4] For the reasons below, Mr. Fagite has not established that the RAD's decision is unreasonable, based on these alleged errors.

II. **Preliminary Issue**

[5] The application is dismissed for mootness as it relates to David Ayomide Fagite and Elijah Temiloluwa Fagite, and will be considered as it relates Mr. Boluwaji Emmanuel Fagite alone.

III. **Issues and Standard of Review**

[6] The issues on this application are whether the RAD's IFA analysis is unreasonable, based on the following alleged errors:

(1) Did the RAD err by relying on the Jurisprudential Guide?

(2) Did the RAD err in finding that the agents of persecution do not have the motivation, reach or influence to locate and harm Mr. Fagite in Port Harcourt or Benin City?

(3) Did the RAD err by failing to consider the psychological evidence and Mr. Fagite's emotional state?

(4) Did the RAD err by failing to consider whether Mr. Fagite's claim has a nexus to a Convention ground?

[7] The parties agree, as do I, that the applicable standard of review for all issues is reasonableness, according to the principles for reasonableness review that are set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

IV. **Analysis**

[8] The two-prong test for an IFA requires that: (i) a refugee claimant would not face a serious possibility of persecution in the IFA, or be personally subject to a risk to life or a risk of cruel and unusual treatment or punishment or a danger of torture; and (ii) it would not be

unreasonable in all the circumstances, including those particular to the claimant, for the claimant to seek refuge in the proposed IFA: *Rasaratnam v Canada (Minister of Employment and Immigration) (1991),* [1992] 1 FC 706 (CA); *Thirunavukkarasu v Canada (Minister of Employment and Immigration) (1993),* [1994] 1 FC 589 (CA). A refugee claimant bears the onus of establishing that a proposed IFA is not viable, and can discharge the onus by defeating at least one prong of the two-prong test.

A. *Did the RAD err by relying on the Jurisprudential Guide?*

[9] Mr. Fagite submits that the RAD erred in relying on factual findings in the revoked Jurisprudential Guide. He submits that the Federal Court of Appeal has recognized that reliance on jurisprudential guides is fraught with risk, as country conditions change with potentially dramatic consequences for, and prejudice to, refugee claimants: *Canadian Association of Refugee Lawyers v Canada (Citizenship and Immigration),* 2020 FCA 196 at para 89 [*CARL FCA*]. While the RAD was entitled to rely on the JG at the time of its decision, Mr. Fagite submits that the nature and degree of the RAD's reliance on the later-revoked JG weakens the RAD's IFA determination to the point of being unreasonable. He argues that several paragraphs of the RAD's decision are virtually identical to the JG, and that documents referred to in the JG and relied on by the RAD have since been removed from the National Documentation Package (NDP) for Nigeria. As such, he contends that the factual basis supporting the RAD's IFA analysis is no longer valid. Mr. Fagite relies on *Liang v Canada (Citizenship and Immigration),* 2019 FC 918 [*Liang*] at paragraph 10 for the proposition that, where the decision-maker expressly adopts the findings in a jurisprudential guide, its revocation weakens the decision-maker's finding on the issue. He states his case can be distinguished from *Agbeja v Canada*

(Citizenship and Immigration), 2020 FC 781 [*Agbeja*], where the Court upheld the RAD's decision despite the revoked JG on the basis that the RAD had appropriately considered the applicant's specific circumstances, coming to its own conclusion on the facts, and had not improperly used the JG as a threshold or benchmark against which the RAD made its factual findings.

[10] The respondent submits that jurisprudential guides do not fetter the RAD's discretion to make factual findings (*CARL FCA* at para 88), and that in the present case, the RAD did not fetter its discretion by relying on the JG in question. The respondent submits the RAD conducted its own analysis, based on Mr. Fagite's evidence and the most recent documentary evidence for Nigeria, to reasonably conclude that Mr. Fagite could relocate to Port Harcourt or Benin City. While the JG was revoked due to developments in Nigeria, including in relation to the ability of single women to relocate to the various IFA locations proposed in the JG, the respondent submits that the framework for analysis remains a valid one to identify a viable IFA. According to the respondent, Mr. Fagite's case is distinguishable from *Liang* (at para 10) and *Cao v Canada (Citizenship and Immigration)*, 2020 FC 337 [*Cao*] (at paras 37-41), where the RAD's decision was found to be unreasonable based on more than simply the RAD's reliance on a revoked jurisprudential guide.

[11] In my view, the RAD's IFA determination was not weakened to the point of unreasonableness by the revocation of the Jurisprudential Guide: *Liang* at para 10. As the respondent notes, the analytical framework in the revoked JG, absent any of the factual findings, remains valid. This is precisely the type of analysis and assessment that was undertaken by the RAD in considering whether Port Harcourt or Benin City are viable IFAs.

[12] The RAD specifically recognized that the JG is not binding. The RAD noted that it had considered the record, the RPD's findings, and Mr. Fagite's submissions, in finding that the RPD had correctly applied the JG to its IFA assessment, and had clearly adjudicated the case based on its particular facts.

[13] With respect to the first prong of the IFA test, the RAD set out several factual findings specific to Mr. Fagite's circumstances, supporting the RPD's conclusion that the agents of persecution (Mr. Fagite's family and community elders) would not have the means or motivation to find and harm him in the proposed IFA locations. The RAD then summarized the RPD's determinative findings in this regard, including: no evidence that the agents of persecution continued their searches; insufficient evidence of the agents' influence and ability to leverage state machinery or national resources; and no credible evidence that Mr. Fagite has a significant public profile in Nigeria. The RAD noted that Mr. Fagite did not make submissions about these findings on appeal. (To the extent Mr. Fagite makes submissions about these findings on judicial review, they are addressed below.)

[14] With respect to the second prong of the IFA test, the RAD referred to the RPD's findings and made its own factual findings, concluding that Mr. Fagite had not demonstrated it would be unduly harsh or objectively unreasonable to relocate to the proposed IFA locations, in view of his particular circumstances. The RAD assessed factors such as: transportation and travel, language, education and employment, accommodation, indigeneship, religion, crime and kidnapping, and the availability of mental health care. Under each factor, the RAD considered Mr. Fagite's personal circumstances and evidence, including, for example, that Mr. Fagite was a skilled and experienced professional with 18 years of education and 11 years of work experience

as a marketing officer, that there was no evidence of serious barriers to accommodation beyond expense, and that indigeneship would not pose an obstacle in view of Mr. Fagite's language skills, education, and work experience. Apart from an alleged error in failing to consider the psychological evidence (addressed below), Mr. Fagite has not challenged these findings regarding the second prong of the IFA test on judicial review.

[15] The RAD's consideration of the evidence in the present case was not a "perfunctory recitation" of the factors in the Jurisprudential Guide followed by a summary conclusion: *A.B. v Canada (Citizenship and Immigration)*, 2021 FC 90 [*A.B.*] at para 65, citing *Ossai v Canada (Citizenship and Immigration)*, 2020 FC 435 at para 26 [*Ossai*]. In my view, the RAD based its decision on Mr. Fagite's specific circumstances and evidence. Also, I agree with the respondent that this case is unlike *Cao*, where the RAD's decision was set aside because the RAD had unreasonably relied on the same factual error that ultimately led to the revocation of the jurisprudential guide used in that case.

[16] In conclusion, I am not persuaded that the RAD fettered its discretion, improperly treated the JG as a "benchmark" or "threshold", or otherwise relied on the revoked JG in a manner that rendered its decision unreasonable: *Agbeja* at paras 77-78; *Onjoko v Canada (Citizenship and Immigration)*, 2020 FC 1006 at paras 24-25; *A.B.* at paras 51, 56-59; *Ossai* at para 26. See also *Saliu v Canada (Citizenship and Immigration)*, 2021 FC 167 at paras 42-43; *Ogunkunle v Canada (Citizenship and Immigration)*, 2021 FC 111 at paras 9, 15. Mr. Fagite has not established that the RAD committed a reviewable error by relying on the revoked Jurisprudential Guide.

B. *Did the RAD err in finding that the agents of persecution do not have the motivation, reach or influence to locate and harm Mr. Fagite in Port Harcourt or Benin City?*

[17] Mr. Fagite did not address this issue in oral submissions at the hearing before this Court. Based on his written submissions, Mr. Fagite submits the RAD erred by concluding there was no evidence that the agents of persecution continued their searches, insufficient evidence of the agents' influence and ability to leverage state machinery or national resources, and no credible evidence that Mr. Fagite has a significant public profile in Nigeria. Mr. Fagite asserts that the RAD erred by:

1) understating the risk from refusing the rituals, which was considered a grave insult;
2) requiring corroborative evidence that the agents of persecution continued their searches;
3) assigning little weight to the fact that one of the agents of persecution is a retired police officer, and misstating country condition evidence about "problems with the national police database"; and
4) applying a higher standard of proof than "a serious possibility" of persecution in the IFA.

[18] Mr. Fagite has not established that the RAD erred in the first prong of the IFA analysis. I disagree that the RAD erred by applying a higher standard of proof—the RAD's reasons demonstrate a clear understanding of the proper test for the first prong of the IFA analysis. It was reasonable for the RAD to require corroborative evidence in light of credibility concerns. I agree with the respondent that Mr. Fagite's arguments that the RAD erred in its factual findings on the first prong of the IFA analysis amount to an invitation for the Court to reweigh the

evidence, which is not the purpose of judicial review: *Vavilov* at para 125; *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No. 732, 160 NR 315 (FCA); *Petrova v Canada (Minister of Citizenship and Immigration)*, 2004 FC 506 at para 55. An applicant bears the onus of establishing they would face a serious possibility of persecution in a proposed IFA, and it was open to the RAD to conclude that the evidence did not establish that the agents of persecution possessed the means or motivation to pursue Mr. Fagite in Port Harcourt or in Benin City.

[19] Furthermore, as this Court explained in *Kanawati v Canada (Citizenship and Immigration)*, 2020 FC 12 at paragraph 23, the RAD's decision must be assessed in the context of how an applicant has framed the appeal, and the RAD is not required to consider potential errors that were not raised. Mr. Fagite did not raise issues related to the RPD's analysis of these factual findings under the first prong of the IFA test on appeal to the RAD. The RAD is not required to provide reasons for unchallenged findings, and a statement that it concurs with uncontested findings does not permit an applicant to raise, for the first time on judicial review, alleged errors of the RPD that were unchallenged on appeal: *Dahal v Canada (Citizenship and Immigration)*, 2017 FC 1102 at paras 30–39.

C. *Did the RAD err by failing to consider the psychological evidence and Mr. Fagite's emotional state?*

[20] Mr. Fagite submits the RAD failed to address the impact of a diagnosis of Post-Traumatic Stress Disorder (PTSD) on the reasonableness of relocating to the IFA locations, under the second prong of the IFA analysis: *Singh v Canada (Citizenship and Immigration)*, 1995 CanLII 3495 (FC); *Olalere v Canada (Citizenship and Immigration)*, 2017 FC 385 at para 60. Mr.

Fagite argues that psychological evidence is central to the question of whether an IFA is reasonable, and cannot be disregarded: *Okafor v Canada (Citizenship and Immigration)*, 2011 FC 1002 at para 13, citing *Cartagena v Canada (Citizenship and Immigration)*, 2008 FC 289 at para 11.

[21] The RAD did not err. As noted by the respondent, the RAD considered the diagnosis and noted that the psychologist had recited Mr. Fagite's concern that his mental health would be negatively affected, but the psychologist had not opined on the impact of a return to Nigeria. The RAD reasonably found that there was no evidence of ongoing treatments, and Mr. Fagite had not met his burden to establish that he would not have access to mental health treatment upon return to Nigeria.

D. *Did the RAD err by failing to consider whether Mr. Fagite's claim has a nexus to a Convention ground?*

[22] Mr. Fagite submits the RAD erred in failing to consider whether the Convention grounds that he had raised were applicable to his claim. Mr. Fagite concedes that it is unnecessary to decide whether a claimant would face a risk of persecution upon return to their area of origin, before determining whether a viable IFA exists: *Kanagaratnam v Canada (Minister of Employment and Immigration)*, 194 NR 46, [1996] FCJ No 75 (CA). However, Mr. Fagite submits that the risk of persecution in a proposed IFA cannot be properly assessed without correctly identifying the nature of the risk, and this requires an examination of the Convention grounds that may be applicable: *Igbinosa v Canada (Citizenship and Immigration)*, 2011 FC 1427 at para 11 [*Igbinosa*].

[23] In this regard, Mr. Fagite submits the RAD erred by failing to consider all grounds supporting his refugee claim under sections 96 and 97 of the *IRPA*. Mr. Fagite submits that this is a duty that extends to all grounds of risk that are apparent on the face of the record, even grounds that an applicant has not raised, and the duty applies even where an applicant's credibility is impugned. In support of these submissions, Mr. Fagite relies on: *Ajelal v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1093 at para 19; *Vilmond v Canada (Citizenship and Immigration)*, 2008 FC 926 at paras 18-19 [*Vilmond*]; *Pastrana Viafara v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1526 at para 6 [*Viafara*]; *Canada (Attorney General) v Ward*, 1993 CanLII 105 (SCC), [1993] 2 SCR 689 at 745-746 [*Ward*]; *Varga v Canada (Citizenship and Immigration)*, 2013 FC 494 at para 5 [*Varga*]; *Safi v Canada (Citizenship and Immigration)*, 2016 FC 1347 at para 14; and *Jama v Canada (Citizenship and Immigration)*, 2014 FC 668 at paras 19-20.

[24] I am not persuaded that the RAD erred on this fourth issue. The error that the RAD allegedly committed is one of failing to engage in an analysis of the grounds supporting Mr. Fagite's claim under sections 96 and 97 of the *IRPA*. However, Mr. Fagite does not point to an error in the RAD's IFA determination as a result—such as an error in identifying the agents of persecution, or a misunderstanding of the nature of the persecution. At the RPD hearing, Mr. Fagite had raised Convention grounds of religion, membership in a social particular group, and political opinion, but on this application he does not specify how the RAD erred in its IFA analysis by failing to decide which of these grounds applies, or whether some other ground not raised but apparent from the record applies.

[25] Certainly, it is critically important to correctly identify and assess the relevant risks of persecution or harm as alleged by a refugee claimant or apparent from the record: *Ward*, *Vilmond*, *Viafara*, and *Varga*, see above. However, in my view, it was unnecessary for the RAD to engage in an analysis of the section 96 and/or section 97 grounds in this case, since the failure to do so did not lead to an error in the IFA analysis—the determinative issue. The RAD understood the basis of Mr. Fagite's refugee claim, and fully addressed his claim based on the risk that was identified, i.e. the fear of persecution by family members and community elders due to Mr. Fagite's opposition to the traditional rituals.

[26] The decision in *Igbinosa* can be distinguished both on the facts and on the underlying issues before the Court on judicial review. In *Igbinosa*, the tribunal's specific (and erroneous) finding that there was no nexus between the applicant's fear and a Convention ground had implications for the tribunal's reasoning with respect to an IFA. Thus, the Court in *Igbinosa* was not satisfied that the tribunal correctly understood the nature of the risk. In the present case, although a specific ground was not explicitly mentioned, the RAD's IFA assessment was based on an accurate understanding of the feared agents and the feared risk of persecution, and did not suffer from the same error identified in *Igbinosa*.

[27] I agree with the respondent that the RAD may move directly to an IFA analysis, provided that the IFA analysis itself is properly conducted: *Kazeem v Canada (Citizenship and Immigration)*, 2020 FC 185 at paras 25-30. In my view, the RAD reasonably concluded that Mr. Fagite could relocate to the IFAs without facing a serious risk of persecution or harm from the agents of persecution, and no error was introduced into the RAD's analysis because it moved directly to that determinative issue.

[28] As noted above, it is evident from the RAD's decision that it correctly identified the agents of persecution and understood the nature of risk. The failure to classify the persecution or harm under sections 96 or 97 of the *IRPA* was inconsequential to the determinative IFA issue, and Mr. Fagite has not established that the RAD's decision is unreasonable.

V. **Conclusion**

[29] Mr. Fagite has not established that the RAD's decision is unreasonable, based on the alleged errors. Accordingly, this application for judicial review is dismissed.

[30] Neither party proposes a question for certification. In my view, there is no question to certify.

JUDGMENT in IMM-2225-20

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. There is no question for certification.

"Christine M. Pallotta"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Gabriel Ukueku	FOR THE APPLICANTS
Camille Audain	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Comfort Law Firm Barristers and Solicitors Calgary, Alberta	FOR THE APPLICANTS
Attorney General of Canada Edmonton, Alberta	FOR THE RESPONDENT