Federal Court  Cour fédérale

Date: 20210920

Docket: IMM-7080-19

Citation: 2021 FC 967

Ottawa, Ontario, September 20, 2021

PRESENT: Mr. Justice McHaffie

BETWEEN:

JAMILA WURAOLA BAKARE
NAEEMAT OLAMIDE BAKARE (MINOR)
FAAIZ OLUMIDE BAKARE (MINOR)
KAREEMAT OLAKUNMI BAKARE (MINOR)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Jamila Wuraola Bakare and her three children seek refugee protection in Canada. Ms. Bakare claims three Ogboni elders from her husband's home village in Nigeria have threatened them for refusing to allow the children to undergo dangerous "cleansing" rituals. The

Refugee Protection Division (RPD) of the Immigration and Refugee Board refused the family's refugee claims on a number of grounds including the availability of an internal flight alternative (IFA) in Lagos. The Refugee Appeal Division (RAD) upheld the IFA finding as determinative of the appeal. In doing so, the RAD refused to accept as new evidence under subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] an opinion the Bakares submitted from a Nigerian lawyer about the viability of an IFA in Lagos.

[2] The Bakares seek judicial review of the RAD's decision. They claim both the refusal to accept the lawyer's opinion and the IFA conclusion were unreasonable.

[3] For the reasons detailed below, I conclude the RAD's decision on both issues was reasonable. The Bakares had argued the lawyer's opinion should be accepted because they could not have anticipated the RPD would find that there was a viable IFA in Lagos. The RAD reasonably rejected this argument since the IFA issue was raised by the RPD at the hearing and the Bakares had a reasonable opportunity to file further evidence on the issue before the decision was made. In the circumstances, it was reasonable for the RAD to conclude the lawyer's opinion could have been provided prior to rejection of the claim.

[4] The RAD also reasonably found that the two prongs of the applicable test for the existence of a viable IFA were met. With respect to the first prong, the RAD reasonably held the Bakares had not established a serious possibility of persecution in Lagos. Although the Bakares had been located by the feared community members in the city of Uyo, it was open to the RAD on the evidence before it to conclude that the agents of persecution did not have the means to

find them in Lagos. Contrary to the Bakares' arguments, the RAD did not apply the wrong standard of proof in assessing this issue. Rather, it appropriately considered the evidence on the evidentiary standard of a balance of probabilities, while applying the "serious possibility" standard in assessing risk of persecution.

[5] As for the second prong, the RAD concluded it was not unreasonable for the Bakares to relocate to Lagos. While the Bakares argue that the evidence about the availability of employment, the cost of housing, and the risk of violence supports a finding it would be unreasonable to relocate, I cannot conclude the RAD's assessment of this evidence and the arguments before it were unreasonable. In particular, the RAD reasonably found the assertion that Ms. Bakare would be viewed as a single woman because Mr. Bakare was unwilling to move to Lagos with the family was unsupported by evidence filed with the RPD.

[6] The application for judicial review is therefore dismissed.

II. Issues and Standard of Review

[7] The Bakares raise the following issues on this application:

A. Did the RAD err in interpreting and applying subsection 110(4) of the *IRPA* in refusing to accept the lawyer's opinion submitted by the Bakares as new evidence?

B. Did the RAD err in finding that the Bakares had a viable IFA in Lagos?

[8] The first of these issues goes to the merits of the RAD's evidentiary ruling, while the second goes to the merits of the RAD's IFA finding. The reasonableness standard applies to both: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25; *Limones Munoz v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 1051 at paras 23–24; *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at paras 29, 74.

[9] Reasonableness review requires the Court to focus on the decision made by the decision maker, and to assess whether it shows the necessary qualities of justification, transparency, and intelligibility. The Court is to refrain from undertaking its own decision or reweighing the evidence. Its task is to assess only whether the rationale for the decision and the outcome to which it led are reasonable. A reasonable decision is one based on an internally coherent and rational chain of analysis, and justified in relation to the facts and law: *Vavilov* at paras 82–86, 99–107.

III. Analysis

A. *The RAD reasonably rejected the lawyer's opinion*

[10] The Bakares submitted to the RAD an opinion from a lawyer in Abuja. The opinion purports to give expert opinion on the subject of an IFA in Nigeria, and on particular issues militating against the relocation of the Bakares to Lagos or elsewhere in Nigeria. The opinion focuses on issues of security and difficulties in employment, particularly for non-indigenes of the State. It gives the lawyer's opinion that "[t]he concept of internal flight alternative is in most cases inapplicable to citizens of Nigeria." The opinion was prepared, and therefore dated, after

the RPD's decision. However, the information contained in it, including by reference to external sources, predated the RPD's decision.

[11] The RAD concluded that the lawyer's opinion did not fall within the scope of subsection 110(4) of the *IRPA*, which restricts the evidence that may be presented on appeal to the RAD:

Evidence that may be presented	**Éléments de preuve admissibles**
110 (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.	**110 (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.
[Emphasis added.]	[Je souligne.]

[12] The Federal Court of Appeal has noted that the ability to file evidence that meets one of the three conditions described in subsection 110(4) is an exception to the general rule that the RAD proceeds without a hearing on the basis of the record before the RPD: *Singh* at para 35; *IRPA*, s 110(3). As a result, the subsection is to be "narrowly interpreted": *Singh* at para 35. Where an affidavit, letter, or statement bears a date after the RPD's rejection, but recounts information or events prior to the rejection, such evidence cannot be said to have arisen after the rejection of the claim, and must be assessed for whether it was reasonably available or whether it could reasonably have been expected in the circumstances to have been presented.

[13] The Bakares submitted that the opinion was new because it arose after the RPD's decision and they "did not anticipate that the Panel would find that an internal flight alternative exists for them in Lagos." The RAD rejected this argument. It found that the contents of the opinion pre-dated the claim and that the evidence therefore did not post-date the claim. It further found that the Bakares could reasonably have been expected to provide the evidence since the IFA issue was raised at the hearing, submissions were made thereon, and there was a period of three months between the hearing and the decision in which the Bakares could have filed the legal opinion.

[14] The Bakares cite Justice Gascon's decision in *Ajaj*, arguing this case raises the same uncertainty as to whether the RAD considered both the possibility that the evidence post-dated the rejection and the possibility that it could reasonably have been expected to have been submitted: *Ajaj v Canada (Citizenship and Immigration)*, 2015 FC 928 at para 55. I disagree. The Bakares' submission to the RAD clearly asserted that the evidence post-dated the decision *and* that they could not have been reasonably expected to submit it. The RAD responded to each contention in turn and I see no uncertainty in its analysis.

[15] As counsel appropriately conceded at the hearing of this application for judicial review, the information in the legal opinion could have been obtained at the time of the refugee hearing, so the only real issue was whether it could reasonably have been expected to be submitted. This question turns on whether the Bakares could reasonably have been expected to submit evidence pertaining to an issue that was raised at the hearing but that they did not know would be the basis of the RPD's decision.

[16] In my view, the RAD did not err in rejecting the Bakares' argument. The question of whether Lagos was a viable IFA was raised squarely by the RPD at the hearing and the RPD gave no indication that it did not remain in issue. The existence of an IFA is determinative of a refugee claim: *Barragan Gonzalez v Canada (Citizenship and Immigration)*, 2015 FC 502 at paras 45–46. An applicant with notice of the IFA issue cannot reasonably contend that they were unable to anticipate that their claim might be decided on this basis.

[17] The question of an IFA is often raised by the RPD for the first time at the hearing, and this Court has concluded that this is sufficient notice of the issue to meet the requirements of procedural fairness: *Tariq v Canada (Citizenship and Immigration)*, 2017 FC 1017 at paras 27–29; *Figueroa v Canada (Citizenship and Immigration)*, 2016 FC 521 at paras 27–28. If an applicant considers it necessary to file further evidence on the IFA issue that can only be obtained after it has been raised at the hearing, this can be done through an application to file post-hearing evidence: *Refugee Protection Division Rules*, SOR/2012-256, Rule 43.

[18] In the present case, as the RAD noted, there were three months between the hearing and the RPD's decision, during which the Bakares made no apparent effort to obtain or submit the legal opinion. If, as the Bakares contend, the difficulty of obtaining evidence from Nigeria meant that more time was needed, they could have asked the RPD for additional time and an opportunity to obtain and submit the evidence. There is no evidence that any such request was made. Having failed to take available steps to file evidence before the RPD, an applicant cannot seek to file such evidence before the RAD. The RAD's conclusion that the Bakares could

reasonably have been expected to present the legal opinion prior to the RPD's rejection of their claim was reasonable.

B. *The RAD reasonably concluded there was a viable IFA in Lagos*

[19] To conclude there is a viable IFA, the RAD must be satisfied that (1) the applicants will not face a serious possibility of persecution or a risk described in section 97 of the *IRPA* in the IFA location; and (2) it is reasonable in all the circumstances for the applicants to seek refuge in the IFA location: *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 (CA) at pp 592–593; *Hamdan v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 643 at paras 10–12.

[20] The Bakares argue the RAD erred in its analysis of each of the two prongs of the IFA test. For the reasons that follow, I conclude the RAD's conclusion on each was reasonable.

(1) First prong: Ability of the agents of persecution to locate the Bakares in Lagos

[21] The Bakares' refugee claim was based on threats from three Ogboni elders residing in Mr. Bakare's native village of Igbagun in Kogi State. While the couple had moved from Kogi State to the city of Uyo in Akwa Ibom State in 2012, they visited Igbagun in 2016 for a wedding when three elders asserted a need to conduct "spiritual cleansing" on their children given the young age at which one of their daughters started her menstrual cycle. The couple refused and returned to Uyo.

[22] The Bakares claim the three elders would be able to locate them anywhere in Nigeria. Ms. Bakare described the elders as rich and influential, and that people from Igbagun who live in Lagos could identify the family. The Bakares note that the elders were able to find them and threaten them at their home in Uyo in March 2018, after they were identified at a market in Uyo by a community member. This was the event that led to the Bakares leaving Nigeria.

[23] The RAD concluded the Bakares had not established more than a speculative risk of persecution in Lagos. In doing so, the RAD found there to be insufficient evidence that the asserted influence of the elders extended into Lagos. The RAD also found that the family having been located in Uyo did not show that they would be located in Lagos, as Uyo was where Mr. Bakare worked and "therefore, it is not surprising that this location was a known place to look for the Appellants." In my view, these conclusions were reasonable.

[24] The Bakares contend the latter finding ignores the fact that Mr. Bakare would be expected to work in Lagos as well. I disagree. The issue was not simply that Mr. Bakare was working in Uyo, but the extent to which he was known to be working in Uyo. There is no evidence the elders would know the Bakares were in Lagos or working there if they moved there. While the Bakares rely on the apparently coincidental meeting at the market in Uyo, which resulted in their presence there being relayed to the elders, the RAD reasonably relied on the size of Lagos as rendering the risk of them being located there by a member of the community—particularly one who wanted to assist in returning them to the elders—to be speculative, regardless of whether the elders were motivated to locate them.

[25] The Bakares also argue the RAD's findings on this issue ignored the affidavit evidence, which showed the elders were looking for the family. However, the RAD expressly considered the affidavits and concluded they only spoke to the family being sought, and not to the wealth or influence of the elders or any other factors related to the risk the Bakares would face in Lagos. While the Bakares cite *Tabatadze* for the principle that affidavits cannot be rejected solely on the basis that they are from family members, there is no indication that the RAD discounted the affidavits on this basis: *Tabatadze v Canada (Citizenship and Immigration)*, 2016 FC 24 at paras 4–7. Rather, the RAD found that even on their face the affidavits did not speak to the relevant issue, namely the extent to which the Bakares would be at risk from the elders if they lived in Lagos. Having reviewed the affidavits, I find the RAD's conclusion to be reasonable.

[26] The Bakares also point to the documentary evidence showing the Ogboni still have "quite significant" influence and power and that some Ogboni members are from the elite, such as the police, judiciary, and government establishments. They argue the RAD's finding that the Ogboni elders would be unable to find them in Lagos was unreasonable in light of this evidence. In addition to there being no evidence to connect the particular elders who are the agents of persecution to the degree of influence of certain Ogboni members described in the document, this argument must fail because neither the evidence in question nor the argument the Bakares now seek to make based on this evidence was raised before the RAD: *Dakpokpo v Canada (Citizenship and Immigration)*, 2017 FC 580 at para 14.

[27] The RAD also rejected the Bakares' argument that the elders could find the family through Ms. Bakare's online presence as having no evidentiary basis. The RAD noted that there

was “no evidence of this argument in the record” and that the Bakares had in fact argued Ms. Bakare “does not know how to use a computer.” The Bakares now contend this conclusion was unreasonable as the RAD did not consider the possibility that Ms. Bakare had an online presence from her mobile phone rather than a computer. I cannot accept this argument. The RAD’s concern with the “online presence” argument was that it was neither raised before the RPD nor grounded in the evidence. I agree with the RAD there was no evidence of Ms. Bakare’s online presence, whether by computer or phone, and no indication this argument was made before the RPD as a manner by which the elders could locate and pursue them.

[28] Finally, I disagree with the Bakares’ argument that either the RPD or the RAD placed an elevated burden on them with respect to the risk of persecution. They argue they do not have to show the elders *would* be able to find them in Lagos, but only that there was a serious risk of them doing so: *Henguva v Canada (Citizenship and Immigration)*, 2013 FC 483 at para 16. However, as the RAD pointed out, there is a distinction between the evidentiary standard on which facts are established, and the requisite legal standard for a finding of persecution. The former standard is that of the balance of probabilities, while the latter is that of a serious possibility of persecution. These differences were set out clearly by the Court of Appeal in establishing the test for an IFA, stating that the decision maker “must be satisfied on a balance of probabilities that there is no serious possibility of the appellant being persecuted in the part of the country to which it finds an IFA exists” [emphasis added]: *Thirunavukkarasu* at p 593; *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (CA) at p 710.

[29] The RPD had assessed the evidence and stated that the Bakares "have provided insufficient reliable and credible evidence to indicate, on a balance of probabilities, the perpetrators would locate the claimants in Lagos to persecute them." While the Bakares challenged the use of the words "would locate" before the RAD, I agree with the RAD that read in context, the RPD did not elevate the standard relevant to the possibility of persecution. Rather, it was simply making a statement regarding the lack of evidence to support, on the applicable balance of probabilities standard, the Bakares' assertion about their risk of persecution in Lagos at the hands of the elders.

[30] I note that at the outset of its analysis of risk, the RPD correctly stated the Bakares bore the burden to show there is a "reasonable chance" that persecution would occur in the IFA. This is a correct statement, using a phrase equivalent to "serious possibility": *Adjei v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 680 (CA) at pp 682–683. In my view, seizing on the RPD's later use of the words "would locate" as showing a misunderstanding of the standard would amount to a "treasure hunt for error" the Supreme Court has reminded us is not an appropriate approach to reasonableness review: *Vavilov* at para 102. In any event, the RAD clearly understood and applied the correct standard.

[31] Having reviewed the RAD's reasons and the Bakares' arguments, I am unable to conclude that the RAD made any material errors that would render its decision on the first prong of the IFA test unreasonable.

(2) Second prong: Reasonableness of relocating to Lagos

[32] I similarly conclude the RAD's assessment of the second prong of the IFA test was not unreasonable.

[33] The Bakares rely on country condition evidence regarding challenges in finding employment in Lagos; the high cost of living, especially housing; and risks of violence against women, particularly single women. The RAD considered this evidence and the Bakares' personal circumstances and concluded they had not established it would be unreasonable for them to relocate to Lagos. In particular, the RAD noted that difficulty in finding employment was not sufficient to render relocation unreasonable, and that there was no evidence that Mr. Bakare would be unwilling to relocate to Lagos with Ms. Bakare and the children such that she would be viewed as a single woman.

[34] In my view, the Bakares' arguments on these issues largely amount to asking this Court to reassess the evidence with respect to employment and housing in Lagos. I also agree with the RAD that the argument that Ms. Bakare would be viewed as a single woman because Mr. Bakare was unwilling to move to Lagos was unsupported by, and even contrary to, the evidence before the RPD, and that the Bakares did not establish why additional evidence on this issue should be accepted by the RAD.

[35] It is to be recalled that the threshold on the second prong of the IFA analysis is a high one. The Federal Court of Appeal has described it as requiring "nothing less than the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily

relocating to a safe area" and as requiring "actual and concrete evidence of such conditions": *Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164 (CA) at para 15. I am not satisfied that the Bakares have established that the RAD's assessment of the evidence and its conclusion that this standard was not made out was unreasonable.

IV. Conclusion

[36] The application for judicial review is therefore dismissed. Neither party proposed a question for certification. I agree that none arises.

JUDGMENT IN IMM-7080-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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