Federal Court  Cour fédérale

Date: 20211027

Docket: IMM-3792-20

Citation: 2021 FC 1147

Ottawa, Ontario, October 27, 2021

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

OLAIDE ISMAILA OLUSESI
OLUWATOSIN ELIZABETH OLUSESI
AYOOLA ESTHER OLUSESI
AYOYELEMI EBENEZER OLUSESI
AYOTOMILOLA EMMENUELLA OLUSESI
AYODAMOPE ELIM OLUSESI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is a judicial review of the Refugee Appeal Division ("RAD")'s dismissal of an appeal by the Applicants, Mr. Olaide Ismaila Olusesi, his spouse, and their four minor children

("the Applicants"). The Refugee Protection Division ("RPD") rejected their claims for refugee protection on the grounds that Abuja, Nigeria, is a viable Internal Flight Alternative ("IFA"), and the RAD upheld this decision by the RPD.

II. Background

[2] The Applicants, Mr. Olusesi ("the Principal Applicant"), his spouse, Mrs. Olusesi, their 3 minor daughters, Ayoola Esther Olusesi, Ayotomilola Emmenuella Olusesi and Ayodamope Elim Olusesi ("the Minor Female Applicants"), and their minor son, Ayoyelemi Ebenezer Olusesi ("the Minor Male Applicant"), are citizens of Nigeria who resided in Lagos, Lagos State, Nigeria. They allege that the Principal Applicant's family demanded that he assume the role of chief (or Oluwo) in his community (Iledi Awo in Ogun State), and that the Minor Female Applicants undergo female genital mutilation ("FGM"). The Principal Applicant refused the position of chief, as accepting it is against his Christian faith.

[3] The Applicants allege that two members of the Principal Applicant's family ("their agents of persecution") visited them at their home in Lagos in July 2015 to demand that FGM be carried out, but that his daughters were not at home at the time. In response to this threat, the Applicants relocated to another home in Lagos, where they allege the Principal Applicant's family approached them again. Further they allege that the Principal Applicant's family convinced their landlord to evict the family. The Applicants then relocated to Okorodu, within Lagos State, in December 2015, where they allege the community was terrorized by a terror group called "Badoo". The family relocated to the Principal Applicant's spouse's father's home in Lagos in February 2017. In May 2017, they allege that their agents of persecution approached

them there, demanding that their daughters undergo FGM or “they would make sure everyone dies in mysterious ways.”

[4] In June 2017, the Applicants left Nigeria for the United States (“US”), and travelled to Canada nine months later (in March 2018) where they to initiated their refugee claim. They allege that, while they were in Canada, their agents of persecution appeared at the Principal Applicant’s wife’s sister’s home in Lagos in January 2019.

[5] The Applicants believes that the Oracle, a spiritual entity, is behind the requirement for FGM. They stated that the agents of persecution and the Oracle will work together to locate them in Abuja. In oral argument, the Applicants more fully discussed the role of the Oracle than in their written submissions. I will not class this as new evidence, as it is clear the decision-maker fully understood what the Oracle was, but the further explanation was directed to the to fully explain the belief that the Oracle was a spiritual entity that was alleged to be the reason the Applicants could be found anywhere.

[6] The RPD, in a decision dated December 6, 2019, found that their failure to claim in the US during the period they were there from June 2017 to March 2018 undermined their claimed fear and credibility. Further, the RPD concluded that they had a viable IFA in Abuja, as they had failed to establish on a balance of probabilities that their agents of persecution have the ability or desire to locate them there.

[7] The RAD officer ("the Officer") found that the determinative issue in this case was the availability of a viable IFA in Abuja. The Officer found that this was determinative, and thus that he did not need to deal with the Applicants credibility and fear. The Officer concluded that the Applicants have a viable IFA in Abuja.

III. Issue

[8] The issue is whether the RAD's conclusion that the Applicants have a viable IFA in Abuja was reasonable.

IV. Standard of Review

[9] The standard of review is reasonableness. When a court reviews administrative decisions, there is a rebuttable presumption that the reasonableness standard will apply. This presumption has not been rebutted in this case (*Vavilov v Canada (Minister of Citizenship and Immigration),* 2019 SCC 65 [*Vavilov*]).

V. Analysis

A. *Was there a serious possibility that the Applicants would be located in Abuja?*

[10] The RAD's determinative conclusion was that the Applicants had a viable IFA in Abuja, Nigeria. The test for the existence of a viable IFA is well-settled, and was set out in *Rasaratnam v Canada (Minister of Employment and Immigration),* [1992] 1 FC 706 (CA) and

Thirunavukkarasu v Canada (Minister of Employment and Immigration), [1994] 1 FC 589 (CA). The two-pronged test, for which both prongs must be satisfied, is as follows:

- "… the Board must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the part of the country to which it finds an IFA exists."

- Moreover, conditions in the part of the country considered to be an IFA must be such that it would not be unreasonable, in all the circumstances, including those particular to the claimant, for him to seek refuge there.

[11] The Applicants in this case submit that the RAD erred in both steps of the test.

(1) Did the RAD err in determining that there was no serious possibility the Applicants would be located in Abuja?

(a) *Sufficiency of Evidence*

[12] In response to the RAD's finding that they provided insufficient evidence to establish a serious possibility that they would be located in Abuja, the Applicants argued that the evidence they provided was sufficient to satisfy the first prong of the IFA analysis. They do so by citing *Zablon v Canada (MCI)*, 2013 FC 58 and *Akinola v Canada (MCI)*, 2019 FC 1308 [*Akinola*], in which cases the Federal Court has found that once established as credible, evidence given regarding fear can satisfy the first prong of the IFA analysis. The Applicants assert that their fears of persecution in Abuja, having been accepted as credible, thus satisfied this threshold.

[13] In doing so, the Applicants confuse sufficiency of evidence and credibility. It is true that credible evidence regarding fear can satisfy the first prong of the IFA analysis. However, the operative word is “can.” In this case, it was reasonably within the Officer’s discretion to assess the credible evidence before him, and determine that it was insufficient to meet the evidentiary threshold for demonstrating the first prong of the test. That is what the Officer did here. Having considered all of the evidence, and the fact that the burden is on the Applicants to adduce evidence to show – on a balance of probabilities – that they face a serious possibility of persecution or a s. 97(1) risk in the IFA, the Officer determined that they did not establish this. This is a reasonable conclusion, and I do not believe any proper reading of the relevant passage from *Akinola* (at para 39) may be used to argue that the Officer must have found the first prong of the test to be met simply because he accepted the Applicants’ fears as being credible.

[14] Further, on the point of insufficient evidence, the Applicants assert that the RAD errs in not explaining why the evidence is insufficient, or what sort of evidence could have reasonably fulfilled this insufficiency. In doing so, they cite Justice Grammond in *Magonza v Canada (MCI),* 2019 FC 14 [*Magonza*], for the proposition that findings of insufficient evidence must be explained. While this is true, the RAD Officer, in their reasons, was detailed and comprehensive for the finding that the Applicants’ evidence was insufficient. In *Magonza,* Justice Grammond emphasized the need to explain findings of insufficient evidence so as to avoid them truly being disguised credibility findings. This is starkly contrasted with the reasons here, as the Officer goes to great lengths to clarify that this is not an adverse credibility determination, but rather that the Applicants simply did not provide any evidence to establish the reach or authority of their alleged agents of persecution in Abuja. A finding of insufficient evidence on the grounds that no

evidence was provided by the Applicants is reasonable, while a finding of insufficient evidence for which no explanation is provided by the decision-maker is not. This case is one of the former, and thus the Officer's explanation on sufficiency of evidence is reasonable. Anything beyond this finding would equate to a reweighing of evidence, which is not the role of judicial review (*Vavilov*, at para 125).

[15] A similar sufficiency of evidence finding was made by the RAD Officer regarding the assertion that the Oracle would assist their agents of persecution in locating them. As the RAD Officer wrote, "while … the Principal (Applicant) testified that he believes that the Oracle can find him anywhere in Nigeria, including in the proposed IFA, he failed to establish, on a balance of probabilities, that the Oracle has the means to do so." This is not an adverse credibility finding, but rather a sufficiency of evidence determination. This was reasonable.

(b) *Misconstruing of Evidence*

[16] The Applicants' submit that the RAD, having considered several attempts by their agents of persecution to find them, erred in concluding that this was not evidence of motivation to find them in Abuja. They provide a lengthy list of un-contradicted facts and evidence regarding these attempts. They further submit that the omission as to any specifics as to their possible persecution in Abuja is because they were not specifically asked about the presence of family members there. In sum, they assert that such misconstructions of evidence are fatal to the reasonableness of the decision (*Vavilov*, at para 126).

[17] On the first point – that of the alleged failure to consider the attempts to locate them as evidence of motivation – I find that these attempts, and indeed all the attempts to locate the Applicants, occurred in Lagos. Without a sufficient link to Abuja, which the Officer does not exist, this merely establishes that their agents of persecution have the means and motivation to locate them in Lagos – not, as they are required to establish, in Abuja. Based on this, it was reasonable for the Officer to conclude that the Applicants failed to establish, on a balance of probabilities, the influence or reach of their agents of persecution in Abuja. The Officer concluded that the factual basis for the Applicants' reliance on their belief that the Oracle can find them anywhere was insufficiently established in the evidence, and I find this to be a reasonable determination.

[18] The crux of the second argument is that the Applicants allege they could not establish this link, as they were never asked for significant details (such as names "or any other details") regarding their family members in Abuja. On this point, the Applicants submits that "(the Officer's) line of question(ing) is insufficient in the context of the Board's prong-one analysis which asks whether the agents of persecution can locate them" because the RPD simply asked "how the agent of persecution could locate (them)." This "how" versus "whether" distinction is insufficient to find the decision unreasonable. Further, while they may not have been asked specifically about Abuja, they were asked generally about family members and how their agents of persecution could locate them. This likely afforded them a reasonable opportunity to bring up the presence of family members or possible agents of persecution in Abuja.

(c) *Social Media Profiles*

[19] The Applicants submit that the RAD erred in the treatment of the Applicants' social media profiles; namely, in finding that it was not unreasonable for them to keep them private in order to hide from their agents of persecution. They acknowledge *Rizwan v Canada (MCI)*, 2017 FC 456 [*Rizwan*], where Justice Roussel held that the requirement to keep social media private is not akin to requiring a Claimant to live in hiding. However, the Applicants here seek to differentiate their facts from *Rizwan* and argue that in this case, the requirement to keep their social media profiles private was unreasonable.

[20] In *Rizwan*, Justice Roussel's decision that keeping social media accounts private was not akin to living in hiding occurred in the context of an individual being returned to their home country (Pakistan). The Applicants argue that this case is sufficiently differentiable that the principle from *Rizwan* does not apply, because the Olusesi family is required to use social media to gain employment contacts and ultimately find a job, arguing that this is a requirement in the 21st century. They contrast this with *Rizwan*, where he was being returned to his home country and where he "can live and work wherever he wants". In my view, this is an insufficient differentiation. *Rizwan* does not deal with the claimant's employment situation, so the Applicants here are inferring with no basis for doing so that Mr. Rizwan could live and work wherever he wanted. There was no caveat in the decision for employment-related social media and I too will rely on Justice Roussel's jurisprudence. The RAD officer dealt with this issue reasonably.

(2) Did the RAD err in determining that it would be objectively reasonable for the Applicants to move to Abuja?

[21] The Applicants submit that the RAD made significant errors in the second prong of their IFA analysis.

[22] As mentioned, the second prong of the test requires the Officer to assess whether it would be objectively reasonable for the Applicants to relocate to Abuja, considering all of their particular circumstances. The onus to establish this is on the Applicants, and it is a high onus, stated in *Ranganathan v Canada (MCI),* [2000] FCJ No 2118, as "requiring nothing less than the existence of conditions which would jeopardize the life and safety of a claimant ..." as well as "actual and concrete evidence of those conditions" (para 15). The Applicants' arguments on this point include both that the RAD's review of the evidence was selective, and that the RAD failed to engage in a cumulative review of the impact of this relocation.

(a) *Was the RAD's review unreasonably selective?*

[23] The Applicants argue that the RAD's review of the country conditions evidence in Nigeria was selective, and that by failing to mention important evidence, the decision may be found to be unreasonable (citing *Vargas v Canada (MCI),* 2011 FC 543 [*Vargas*]). Specifically, they argue that the RAD ran contrary to their stated intentions and relied on a revoked item from the National Documentation Package ("NDP").

[24] It is noted that the case upon which their argument is based, *Vargas*, was decided over 10 years ago, and notably, prior to *Vavilov*. *Vavilov* instructs us that judicial review is not a line-by-line treasure hunt for errors, but rather a process in which it is determined whether "a reasoned explanation for the decision can be discerned," based on an internally coherent and rational chain of analysis, and the outcome is acceptable and defensible in light of the factual and legal constraints acting on the decision maker (*Vavilov* at paras 102, 85, and 101). It is also not a process in which administrative decision-makers are to be expected to "respond to every argument or line of possible analysis" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*] at para 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (*Newfoundland Nurses*, para 16).

[25] Essentially, the Applicants allege that, at times, the RAD cites Item 13.1 in an NDP that was revoked 3 months before their decision was made, and at times they cite the most up-to-date version of the NDP. They deem this (relying on Item 13.1 of the August 2019 NDP, rather than the November 2019 NDP) to be selective evidence consideration and thus unreasonable.

[26] It is a well-established presumption that tribunals are assumed to have weighed and considered all of the evidence (see, e.g. *Florea v MEI*, 1993 FCJ No 598 (FCA)). The Applicants bear the onus of rebutting this presumption.

[27] The substance of the Applicants' complaint, is the toggling back and forth between the two NDPs, despite requesting submissions on the later one specifically. This strikes me as

perhaps incorrect, but not unreasonable – especially given the substance of the matter. Item 13.1 of the November 2019 NDP, which was new and which is what the submissions were requested on, was referenced 15 times, and aside from that, the other references are made to the August 2019 NDP (in which the items and contents remain, substantially the same, though the numbers were shuffled around at times). In particular, the Item 13.1 of the August NDP which the RAD relies on is reproduced in Item 16.14 of the November NDP.

[28] Ultimately, the argument by the Applicants becomes a line-by-line treasure hunt for error, rather than a holistic assessment of the reasoning and chain of analysis of the decision-maker, which was cautioned against in *Vavilov*. I find the treatment of the NDP to be a slight error, but not unreasonable. It would be preferable if they were more consistent and careful with their references, but it is not determinative.

(b) *Did the RAD fail to engage in a cumulative review?*

[29] On this point, the Applicants submit that the RAD failed to consider the cumulative impact that moving to Abuja would have on them. Namely, that the Officer's reasoning at paragraph 49 of the RAD Decision did not allow them to see the individual impact of each circumstance or factor in this cumulative analysis. They purport that the RAD failed to holistically assess the impact that non-indigeneity would have on the Applicants' ability to live safely in Abuja was dealt with each point in isolation. They submit that paragraph 49 of the Officer's reasons does not allow the Applicants to understand the reasoning of the RAD regarding each individual hardship in Abuja.

[30] I do not agree with the Applicants' assessment of the decision. They submit that the reasons are insufficient because the RAD did not note each point in the cumulative circumstances analysis individually, but this is not a requirement. Reviewing courts cannot expect administrative decision-makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (*Vavilov* at para 128). All that is required is that "a reasoned explanation for the decision can be discerned," based on an internally coherent and rational chain of analysis, and the outcome is acceptable and defensible in light of the factual and legal constraints acting on the decision maker (*Vavilov* at paras 102, 85, and 101). This is the case here – the Officer, in paragraph 49, notes their role to assess all of the factors cumulatively, and runs through each of the factors to be considered comprehensively in the preceding paragraphs. The fact that the Officer does not, in the concluding paragraph, say "this factor had X weight, this factor had Y weight" does not render the decision unreasonable (*Vavilov).*

[31] The overarching issue in this judicial review is whether the decision by the RAD Officer was reasonable. As set out in *Vavilov* a decision is reasonable where the reviewing court is able to trace the decision-maker's reasoning without encountering fatal flaws, and there is a line of analysis within the reasons that could reasonably lead the decision-maker to the conclusion at which they arrived (*Vavilov*, para 102). As referenced throughout this decision it is not a line-by-line treasure hunt for error. A reasonable decision must simply be based on an internally coherent and rational chain of analysis, which is justified in relation to the facts and law before the decision-maker.

(c) *Did the RAD err by relying on a revoked Nigerian Jurisprudential Guide?*

[32] The final argument the Applicants raise is that the RAD's Decision was unreasonable because it relied on a Nigerian Jurisprudential Guide ("JG") which was revoked approximately a month and a half after the RAD's Decision. The Nigeria JG was in effect at the time of the RAD's Decision.

[33] There is case law indicating that the revocation of a JG does weaken the support for findings based on it, to the extend that they track the revoked portion of the JG and those portions are relied upon (see, e.g. *Liang v Canada (MCI),* 2019 FC 918 [*Liang*]). In this case, the decision-maker made the decision based on the guide that was then in place. The RAD cannot now be found in error when the guide was subsequent to his decision revised. As well, in this case, the revised guide's changes did not impact the decision even if it was in place at the time.

[34] Further, the JG was not binding nor determinative in the RAD's conclusion, as the Officer made general reference to factors therein and a framework for IFA analysis (see para 13 and 30 of the RAD's Reasons), both of which were not changed in the new JG. This is contrasted with cases, such as that of *Liang* (cited by the Applicants) where the Immigration and Refugee Board ("Board") expressly adopted the reasoning in the revoked JG, or *Cao v Canada (MCI),* 2020 FC 337, where there was significant reliance on the revoked portion of the JG. This is not the case here. Simple reference to a revoked JG does not render the RAD's Decision unreasonable. Given that is the case here, the use of the JG was not unreasonable. This is particularly the case given that the Chairperson of the Board noted that the framework (from the

JG) which was used by the RAD here "constitutes a proper legal test for identifying a viable IFA … (which) may be used in future cases."

VI. Conclusion

[35] This application is dismissed. I find that the RAD's Decision to uphold the RPD's finding that there was an IFA in Abuja was reasonable.

[36] The Applicants had proposed a certified question but then withdrew it post-hearing. I will not grant a certified question.

JUDGMENT IN IMM-3792-20

THIS COURT'S JUDGMENT is that:

1. This application is dismissed;

2. No question is certified.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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