Federal Court  Cour fédérale

Date: 20220124

Docket: IMM-5911-20

Citation: 2022 FC 6

Ottawa, Ontario, January 24, 2022

PRESENT: The Honourable Madam Justice Rochester

BETWEEN :

PAULO M POPOOLA,
JOSEPH POPOOLA MENDES CUESTA

Applicants

and

THE MINISTRY OF CITIZENSHIP AND IMMIGRATION

Defendant

JUDGMENT AND REASONS

I. Overview

[1] The Applicants are a father and son. The Principal Applicant is Mr. Paulo Mendes Popoola, who is a citizen of Nigeria. His son, Mr. Joseph Popoola Mendes Cuesta, is a citizen of Ecuador. The Applicants seek judicial review of a decision of the Refugee Appeal Division [RAD] dated October 16, 2020 [Decision] confirming the decision of the Refugee Protection

Division [RPD] dated July 9, 2019 that the Applicants are neither Convention refugees nor persons in need of protection pursuant to section 96 and section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] As to the father, the Principal Applicant, the RPD and the RAD determined that he had internal flight alternatives [IFA] in Nigeria, namely Lagos and Benin City.

[3] As to the son, the Minor Applicant, the RPD and the RAD concluded that the fact that he was Afro-Ecuadoran was insufficient to establish that he faced a serious possibility of persecution on a Convention ground or that he would be subject to a danger of torture, risk to his life, or a risk of cruel and unusual treatment or punishment should he be returned to Ecuador. In the present matter, the Applicants did not submit arguments as to the reasonableness of the RAD's rejection of the Minor Applicant's claim.

[4] For the reasons that follow, this judicial review is dismissed.

II. Background

[5] The Principal Applicant's claim is based on the threat that he allegedly faces from the Amadiyat Muslim Organization [Amadiyat], based in Ayetoro. He submits that his father, now deceased, was a prominent leader in Amadiyat.

[6] The Principal Applicant states that in 1992, against his family's wishes, he converted from Islam to Christianity. He claims that in 1994 he received death threats as a result of his conversion, that members of Amadiyat burnt down his family home, and that he was beaten.

[7] The Principal Applicant fled Nigeria, travelled through several countries, and then came to reside in Ecuador where he worked as a merchant in the clothing industry. He met his common-law wife in Ecuador and the Minor Applicant was born there.

[8] In 2013, the Principal Applicant, his common-law wife, and the Minor Applicant, fled to the United States and claimed asylum. Before the claims were finalized, the Principal Applicant's common-law wife was deported to Ecuador, her country of origin. Following her deportation, and fearing that he would be deported to Nigeria, in 2018 the Principal Applicant crossed into Canada with the Minor Applicant and claimed asylum on behalf of both of them.

[9] The Principal Applicant sought refugee protection against Nigeria, while the Minor Applicant sought refugee protection against Ecuador and relied on his father's allegations.

[10] The RDP determined that the Principal Claimant had viable IFAs in the cities of Lagos and Benin City. In assessing the Principal Applicant's claim, the RPD found that he has failed to establish how he could be located by Amadiyat, a non-state actor, in cities with millions of inhabitants more than two decades after he had left Nigeria.

[11] On his Basis of Claim Form, the Principal Applicant listed English, Yoruba, French and Spanish as spoken languages, and indicated that he graduated high school and has had work experience in various industries over more than two decades in several countries. The RPD found that these factors weighed in favour of him being able to find employment in the proposed IFA locations. The RPD also considered the level of tolerance of converts by Christian and Muslim communities in the IFAs. The RPD ultimately found that the Principal Applicant had not established that it would be unreasonable or unduly harsh for him to relocate to the proposed IFA cities.

[12] As to the Minor Applicant, the Principal Applicant informed the RPD that he based his son's claim on his own experiences in Ecuador. The RPD analyzed the elements raised in the Principal Applicant's narrative concerning his time in Ecuador. The Principal Applicant testified that he had been attacked several times because he was a member of a visible minority there. The RPD noted several omissions and contradictions between the information provided in the Basis of Claim form and the Principal Applicant's testimony at the hearing. The RPD ultimately found that the Principal Applicant was not a credible witness. On the basis of the Principal Applicant's lack of credibility and insufficient objective evidence, the RPD rejected the Minor Applicant's claim.

A. *The Decision*

[13] Before the RAD, the Principal Applicant submitted that the RPD erred in finding a viable IFA and in determining that he lacked credibility.

[14] As a preliminary point, the Principal Applicant sought to adduce new evidence, namely a police report and photos concerning an attack suffered by the brother of the common-law wife of the Principal Applicant in 2018, and a newspaper article about kidnapping in Nigeria. The RAD found the new evidence was inadmissible on the basis that the Applicant had not demonstrated that the evidence met the requirements of subsection 110(4) of IRPA. In particular, the RAD found that the photographs and the police reports related to events that pre-dated the rejection of the claim by the RPD, and that the Principal Applicant did not explain why they could not have been obtained beforehand. As to the news article, the RAD rejected it on the basis that it pre-dated the rejection of the claim by the RPD.

[15] On June 18, 2020, the RAD sent a letter to the counsel for the Applicants notifying him that the RAD would be relying on the most recent version of the National Documentation Package [NDP] for Nigeria, dated April 9, 2020, and providing the link to the NDP. The letter further provided that if the Applicants wished to submit observations on the (translation) “tabs in question”, then they must provide the observations, along with supporting evidence, by July 20, 2020.

[16] In response, by way of a letter dated July 17, 2020, the Applicants submitted further arguments and additional evidence. The letter noted that the events detailed in the additional evidence took place after the Applicant’s record had been filed. The additional evidence did not relate to the updated NDP, rather it contained: (i) a copy of a birth certificate of Akeem Adenle, described as the brother of the Principal Applicant; (ii) a copy of a police report dated December 18, 2019, made by a neighbour, reporting an attack by “some Islamic hoodlums” on Akeem

Adenle Popoola “in his apartment” that was “based on the issue of family and religion”; (iii) an online article dated December 17, 2019, on SamsKoncept entitled “Attack: Some muslim hoodlums broke into a house and attacked the occupant, dealt with him ruthless”, which detailed that men in “Islamic attire” broke into Mr. Akeem Adenle Popoola’s apartment to question him “about his brother whom had an issue with the Islamic organization many years back of which they had been on the lookout for him since then”. The article further detailed that “he was dealt with ruthlessly and injured badly until he was rescued by vigilante in his community who came and Chase (sic) the hoodlums away”; (iv) an online article dated December 20, 2019, in Tribune Point Weekly, with exactly the same title and text as the SamsKoncept article; (v) an affidavit by Mr. Lawal Akindele that he was attacked in his home on April 5, 2020, by “some hoodlums identified as Islamic persons” who sought to find out the whereabouts of Akeem Adenle Popoola, who was known to be a friend of his.

[17] The RAD noted that no explanation was provided as to why the Applicants waited seven months after the events (save for document (v)), until July 2020, to provide the above-mentioned documents. The RAD also detailed its concerns regarding the credibility of the documents. On September 11, 2020, the RAD asked for the originals of the documents. Having examined same, the RAD noted that the seal on the police report had not been affixed but rather had been photocopied onto the document. Moreover, the RAD noted certain security features were missing, notably, the report was missing the stamp of the police station.

[18] As to the online articles, the RAD noted, relying on the NDP, that brown envelope journalism is prevalent, where citizens pay journalists to publish or broadcast stories. Upon

examining the articles, the fact that they were identical but in two different sources, riddled with grammatical errors, and were in stark contrast to other articles published, the RAD expressed serious doubts about the authenticity of the articles.

[19] The irregularities in the additional documents, the fact that they were filed without explanation and only after the RAD had requested observations in relation to the updated NDP, led the RAD to conclude that the documents had been fabricated. Consequently, the RAD determined that the new documents were not admissible, having taken into account the requirements of section 29(4) of the *Refugee Appeal Division Rules*, SOR/2012-257 [*RAD Rules*] and section 110(4) of IRPA.

[20] The RAD determined that the RPD did not commit an error by rejecting certain allegations made by the Principal Applicant on the basis of credulity.

[21] The RAD conducted its own analysis of the evidence and agreed with the RPD that the Principal Applicant had a viable IFA available in Lagos, a city of 13.9 million inhabitants and Benin City, a city of 1.67 million inhabitants. The RAD concluded that the Principal Applicant had not established that Amadiyat had the capacity or the interest to search for the Principal Applicant throughout the country more than twenty-six years after he left Nigeria.

[22] The RAD concluded that with the Principal Applicant's language skills and work experience he had the capacity to find employment. The RAD noted that the Principal Applicant is Yoruba, and that in Lagos and Benin City in the south-west of Nigeria, Yorubas constitute the

largest ethnic group. Moreover, Christianity is the predominant religion in the southern states of Nigeria. The RAD therefore concluded that it was not unreasonable for the Principal Applicant to seek refuge in Lagos or Benin City.

[23] As to the Minor Applicant, the RAD noted that RPD's conclusion as to the Minor Applicant was not contested before the RAD. In any event, the RAD concluded that the RPD determination was correct.

III. Issues and Standard of Review

[24] The Applicants have raised numerous issues, which I reformulate as follows:

A. Did the RAD err by the refusing to admit the Principal Applicant's new evidence?
B. Was the RAD's determination that the Principal Applicant has a viable IFA within Nigeria reasonable?
C. Was the RAD's rejection of the Minor Applicant's appeal reasonable?

[25] The Applicants frame the RAD's refusal to admit new evidence following the RAD's letter of June 18, 2020 as a breach of procedural fairness. The Respondent submits that the applicable standard of review is one of reasonableness. I agree with the Respondent. As stated by my colleague Justice Mosely, "the standard of review of the RAD's decision on whether to admit new evidence both under Rule 29(4) of the *RAD Rules* and subsection 110(4) IRPA, is reasonableness" (*Shroub v Canada (Citizenship and Immigration)*, 2021 FC 34 at para 17; see also *Canada (Minister of Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 29).

[26] The reasonableness standard therefore applies to the RAD's assessment of the admissibility of new evidence, to the RAD's determination as to the availability of an IFA (*Tariq v Canada (Citizenship and Immigration)*, 2017 FC 1017 at para 14), and to the rejection of the Minor Applicant's claim.

[27] Reasonableness is a deferential, but robust, standard of review (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 12-13 [*Vavilov*]). For the reviewing court to intervene, the challenging party must satisfy the court that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100). A reviewing court should also refrain from reweighing or reassessing the evidence considered by the decision maker and must not, absent exceptional circumstances, interfere with factual findings (*Vavilov* at para 125). The party challenging the decision bears the onus of demonstrating that it is unreasonable (*Vavilov* at para 100).

IV. Analysis

A. *Did the RAD err by the refusing to admit the Principal Applicant's new evidence?*

[28] As to first batch of new evidence described in paragraph 14 of this judgment, I find that the RAD properly refused the documentation because it did not meet the statutory requirements of subsection 110(4) of IRPA, being that it (a) arose after the rejection of the RPD claim, (b) was not reasonably available at the time of the RPD's rejection, or (c) the applicants could not reasonably have been expected in the circumstances to have presented at the time of the RPD's

rejection. It was incumbent on the Applicants to provide an explanation as to why the documentation, which pre-dated the rejection of the RPD claim, was not reasonably available or why they could not have been reasonably expected to present the evidence before the rejection of their claims by the RPD (*Tiodunmo v Canada (Citizenship and Immigration)*, 2019 FC 1489 at para 17). The Applicants did not do so.

[29] As to the second batch of new evidence described in paragraph 16 of this judgment, in submitting new evidence, the Applicants were obliged pursuant to Rule 29(3) of the *RAD Rules* to provide an explanation as to how the additional evidence met the requirements of subsection 110(4) of IRPA and how the evidence related to the Applicants. Other than stating in a cover letter that the evidence arose after the Applicants' record had been filed, no further explanation was provided by the Applicants.

[30] Rule 29(4) of the *RAD Rules* requires that the RAD consider any relevant factors including: the document's relevance and probative value; any new evidence the document brings to the appeal; and whether the person who is the subject of the appeal could have with reasonable efforts submitted the document earlier.

[31] I find that the RAD carefully considered the second batch of new evidence taking into account the requirements of Rule 29(4) of the *RAD Rules* and subsection 110(4) of IRPA. Given the irregularities in the documentation identified by the RAD, the passage of time before they were filed, and the lack of explanation by the Applicants, it was not unreasonable for the RAD to

conclude that the documents (except for the birth certificate) were fabricated and to refuse to admit them into evidence.

[32] The Applicants submit that the RAD acted unfairly in refusing to admit the new evidence after inviting the Applicants to submit further evidence in its letter of June 18, 2020. I disagree. The RAD's letter dated June 18, 2020, clearly invited observations in relation to the updated NDP. It was not, in my view, an invitation or an undertaking that any evidence would be accepted, regardless of whether or not it met the requirements of Rule 29(4) of the *RAD Rules* and subsection 110(4) IRPA.

[33] At the hearing, the Applicants plead that the Decision refers to the fact that the NDP was updated, that the updated NDP was communicated to the Applicants, and that the Applicants were invited to present additional observations on [translation] "the issue of a potential IFA". This reference in the Decision to the IFA, rather than the NDP, is, in the Applicants' submission, a breach of procedural fairness. I disagree. The Supreme Court of Canada in *Vavilov* instructs that the reviewing court should not approach the underlying decision with the intention of conducting a "line-by-line treasure hunt for error" (at para 102), but rather concern itself with whether "the decision as a whole is transparent, intelligible and justified" (at para 15). The Decision states that in order to consider the question of an IFA, the RAD relied on the updated NDP, and provided the Applicants with the opportunity to comment on it. As a whole, I find the RAD's reasoning to be transparent, intelligible and justified. There is no doubt in fact as to what the RAD relied on, i.e. the updated NDP, nor is there any doubt that the Applicants were provided with an opportunity to comment on it in the context of their representations on the IFA.

[34] In summary, I am satisfied that the RAD's assessment of both batches of new evidence was reasonable, in the circumstances, and I see no reason to intervene.

B. *Was the RAD's determination that the Principal Applicant has a viable IFA within Nigeria reasonable?*

[35] A viable IFA means that the Principal Applicant could seek refuge in a part of Nigeria other than the area where he had faced persecution or a risk of harm. As noted recently by my colleague Justice Fothergill, the test for a viable IFA has been well-established: first, the decision maker 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 where it finds an IFA to exist; and second, conditions in that part of the country must be such that it would not be unreasonable, in all the circumstances, for the claimant to seek refuge there (*Ifaloye v Canada (Citizenship and Immigration)*, 2021 FC 1110 at para 14). Both prongs of the test must be satisfied. The onus is on the Principal Applicant to negate either of the two prongs (*Chitsinde v Canada (Citizenship and Immigration)*, 2021 FC 1066 at para 21).

[36] The Principal Applicant, in his written submissions and at the hearing, took issue with the analysis of the RAD as to the first prong of the IFA test. The Principal Applicant submits that the RAD's analysis is unreasonable on the basis that it failed to take into account the evidence of the risk throughout the country and the testimonial evidence of the Principal Applicant as to his father's death.

[37] The Principal Applicant submits that the RAD had accepted that Amadiyat was present in the entire country and that his father had been killed by the members of this organization by reason of his son's conversion. Having accepted this evidence, but having found that a viable IFA exists, renders the Decision unreasonable. The Principal Applicant references two paragraphs of the Decision, paragraphs 33 and 35, in support of his argument.

[38] The Principal Applicant's submission is unfounded. In paragraphs 33 and 35 of the Decision, the RAD is simply describing the Principal Applicant's allegations. The RAD did not accept these allegations. In paragraph 34, the RAD states that the Principal Applicant had not met his burden of establishing a prospective risk in the proposed cities. Similarly, in paragraph 36 of the Decision, the RAD outlined the reasons why it agreed with the RPD that the allegation that agents of Amadiyat were responsible for his father's death was not credible. The RAD then proceeded to consider in detail the allegation that the death of the Principal Applicant's father in 2008, approximately fifteen years after the Principal Applicant left the country, was linked to Amadiyat and his son's conversion. This allegation had not been raised in the Basis of Claim form, and both the RPD and the RAD considered this omission to be significant. The RAD found the Principal Applicant's testimony on this issue to be confusing and vague.

[39] The Principal Applicant pleads that he should not be faulted for having omitted the circumstances of his father's death from his Basis of Claim form, as such forms are often prepared quickly and with the assistance of counsel. Instead, the Applicant submits that RAD should have taken his testimony into account, along with an affidavit from a former neighbour that corroborated this allegation.

[40] The Principal Applicant is effectively inviting this Court to reweigh the evidence. I decline to do so (*Vavilov* at para 125). The RAD considered both the testimony and the affidavit from the former neighbour. Having considered the neighbour's affidavit, the RAD found it to be very vague and concluded that it did not corroborate the Principal Applicant's allegation.

[41] Contrary to the Principal Applicant's submissions, I find that the RAD did engage with, and properly considered, the evidence that was before it in coming to its conclusions. As noted above, the burden is on the Principal Applicant to show that there are sufficiently serious shortcomings in the RAD's decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Having considered the record, I find no reviewable error in the RAD's analysis that the Principal Applicant would not face a serious risk of persecution in Lagos or in Benin City.

C. *Was the RAD's rejection of the Minor Applicant's appeal reasonable?*

[42] As noted above, the Applicants did not submit arguments as to the reasonableness of the RAD's rejection of the Minor Applicant's claim. As the Applicants bear the onus of demonstrating that the RAD's decision was unreasonable, I therefore find no reviewable error in the RAD's assessment of the Minor Applicant's claim.

V. Conclusion

[43] For the above reasons, the present application for judicial review is dismissed. Neither party proposed a question of general importance for certification, and none arises.

JUDGMENT in IMM-5911-20

THIS COURT ORDERS that:

1. This application for judicial review is dismissed;

2. There is no question for certification.

"Vanessa Rochester"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	PAULO M POPOOLA, JOSEPH POPOOLA MENDES CUESTA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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