Federal Court  Cour fédérale

Date: 20220610

Docket: IMM-1392-21

Citation: 2022 FC 868

Toronto, Ontario, June 10, 2022

PRESENT: The Honourable Madam Justice Furlanetto

BETWEEN:

LUKMAN AKOLAWOLE ATOLAGBE
PHAOZIAT MORENIKEJI ATOLAGBE
HANNAT FOLAJOMI ATOLAGBE
HANEEF FOLARIN ATOLAGBE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a February 2, 2021 decision [Decision] of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board, upholding the Refugee Protection Division's [RPD] finding that the Applicants are not Convention refugees or persons in need of protection pursuant to sections 96 and 97(1) of the *Immigration and Refugee*

Protection Act, SC 2001, c 27 [IRPA]. The determinative issue was the availability of an internal flight alternative [IFA] in either Port Harcourt or Abuja, Nigeria.

[2] The Applicants argue that the RAD unreasonably erred by: (1) refusing to admit new evidence; and (2) determining that the Applicants have viable IFAs based on recent developments in Nigeria and misapplications of the IFA test.

[3] For the reasons that follow, the application is dismissed.

I. Background

[4] The Applicant family are citizens of Nigeria. They seek refugee status based on their fear that their twin daughters (who are Canadian citizens), and their eldest daughter (who is part of the refugee claim) will be subject to female genital mutilation if they return to Nigeria. They also assert a general fear that they will be persecuted by the head of their extended family, Chief Atolagbe [Chief], for failing to circumcise their twin daughters earlier.

[5] In 2013, the Applicants assert that the Chief and other family members forcibly circumcised the adult Applicants' son after the adult Applicants did not follow traditional family rituals to circumcise the son prior to his naming ceremony. The incident was reported to the police who did not offer any assistance.

[6] In 2017, the adult male Applicant [Principal Applicant] travelled to Mexico to begin Ph.D. studies. Shortly thereafter, the adult Applicants learned they were expecting twin girls. The

Applicants fled to the United States [US] to avoid being pressured by their relatives to circumcise their daughters. The Applicants decided not to make a refugee claim in the US and made arrangements to enter Canada. They arrived in December 2017, shortly before the twins were born.

[7] The RPD issued its decision refusing the claim on November 27, 2019. The RPD concluded that the Applicants were neither Convention refugees nor persons in need of protection based on a viable IFA in Port Harcourt or Abuja, Nigeria.

[8] On appeal to the RAD, the Applicants argued that the RPD erred in finding that they had IFAs in Nigeria. They sought, but were refused, the introduction of new evidence, including news articles and a photograph of a General based in Abuja who is part of the Principal Applicant's family. They assert that the General threatened the family, through an interaction with the Principal Applicant's mother that they assert took place shortly after the RPD decision. They also sought to introduce an affidavit from the Principal Applicant's mother describing the events with the General.

[9] Additionally, the Applicants sought to introduce two letters: one from a Senior Lecturer in the Department of Sociology at Lagos Statue University (Dr. Adedeji Saheed Oyenuga); and the second from J.D.I. Alapo and Co., Barristers, Solicitors and Chartered Mediators.
Dr. Oyenuga sought to provide expert opinion evidence on issues of discrimination against non-indigenes and to provide fact evidence relating to the Chief. The letter from J.D.I. Alapo and Co.

addressed the viability of the proposed IFA locations. Both letters were rejected as post-dating the claim and on the basis that the content was not new and could have been provided before.

[10] On the IFA analysis, the RAD found that the Applicants had not established on a balance of probabilities that the Chief or any other family members were a threat to them or would be motivated to cause them harm or to track them down in the proposed IFA locations. The RAD also found that the Applicants could use reasonable privacy settings on social media to keep their location private. With respect to the second part of the IFA test, the RAD agreed with the RPD that the Applicants' non-indigene status and religious, linguistic, educational and work backgrounds would not pose a barrier sufficient to render the IFA locations unreasonable.

II. Issues and Standard of Review

[11] The following issues are raised by the application:

(a) Did the RAD err by refusing to admit the Applicants' new evidence?

(b) Did the RAD err in determining that the Applicants had viable IFAs in Port Harcourt and Abuja thus making the decision unreasonable?

[12] The standard of review of the substance of the Decision is reasonableness. None of the situations that would rebut the presumption that all administrative decisions are reviewable on a standard of reasonableness are present: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 9-10, 16-17.

[13] A reasonable decision is "based on an internally coherent and rational chain of analysis" that is "justified in relation to the facts and law that constrain the decision maker": *Vavilov* at

paras 85-86; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at paras 2, 31. A decision is reasonable if, when read as a whole and taking into account the administrative setting, it bears the hallmarks of justification, transparency, and intelligibility: *Vavilov* at paras 85, 91-95, 99-100.

[14] I note that the Applicants frame their argument relating to the new evidence as one of procedural fairness, however the substance of their argument is based on the reasonableness of the Decision. As there is no argument that has been raised relating to the procedure associated with the assessment of the evidence, I am of the view that the reasonableness standard is the only applicable standard of review and have considered this issue accordingly: *Rehman v Canada (Citizenship and Immigration)*, 2022 FC 783 at para 30; *Urbieta v Canada (Citizenship and Immigration)*, 2022 FC 815 at para 14.

III. Analysis

A. *Did the RAD err by refusing to admit the Applicants' new evidence?*

[15] Pursuant to subsection 110(4) of the IRPA, in order for evidence to be admissible on appeal the evidence must have arisen after the rejection of the claim, must not have been reasonably available before, or if reasonably available before, must be evidence that the person could not reasonably have been expected in the circumstances to have presented at the time of rejection: *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*] at para 34.

[16] The criteria of newness, relevance, credibility and materiality must also be satisfied: *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385 [*Raza*]; *Singh* at paras 38-49.

[17] The Applicants argue that in denying their new evidence the RAD misconstrued the Applicant's new evidence and misapplied the legal test for new evidence. They assert that the RAD failed to take into account the *Singh/Raza* factors of credibility, relevancy and materiality, focussing only on whether the evidence was new. The Applicants contend that they could not have reasonably been expected to present this evidence before as it relates to questions raised by the RPD during the Applicant's testimony.

[18] The Applicants rely on *Cox v Canada (Citizenship and Immigration)*, 2012 FC 1220 [*Cox*] and *Arisekola v Canada (Citizenship and Immigration)*, 2019 FC 275 [*Arisekola*] as support for their argument. However, *Cox* concerned a request to introduce new evidence to the RPD post-hearing. Similarly, *Arisekola* concerned a request to introduce new evidence to the RAD after the applicants' appeal record was perfected. These requests are governed by former Rule 37 of the *Refugee Protection Division Rules*, SOR/2002-228 (currently Rule 43 under the *Refugee Protection Division Rules*, SOR/2012-256) and Rule 29 of the RAD Rules, which both contain specific factors the RPD and RAD must consider when determining to admit new evidence. Neither rule is applicable in this case, as the Applicants sought to introduce their new evidence prior to perfection and hearing.

[19] The Respondent asserts that the Applicants are seeking to improperly bolster their evidence through the new evidence submitted: *Marin v Canada (Minister of Citizenship and Immigration)*, 2018 FC 243 at paras 16-20. They assert, and I agree, that for new evidence to be admissible it must meet both the test set out in s. 110(4) of the IRPA and the *Singh/Reza* factors.

[20] With respect to the affidavit from the Principal Applicant's mother, while the RAD accepted that the evidence was new and met s 110(4) of the IRPA, it found that the evidence was not credible in view of its content and fortuitous timing, almost two years after the birth of the twins, but right after the RPD decision. In my view, it was reasonable for the RAD to question the credibility of the mother's statements based on the Applicants' failure to mention the General when presented with the RPD's questions about the viability of Abuja as an IFA. Given the General's alleged power and influence in Abuja, it is unclear why the Applicants would not raise him to the RPD in either their written or oral submissions. As stated by the RAD:

> Despite being asked many times by both the panel and their own lawyer why they could not relocate to Abuja, neither adult Appellant brought up the existence of the General, who they claim is a member of the family who are the agents of persecution, in particular the brother of the Chief, their main agent of persecution, and that he is allegedly based in Abuja, one of the proposed IFA locations, or that he is connected to the military. I find that this is an omission in their evidence that seriously undermines the credibility of the new evidence. The Appellants were clearly advised that a possible IFA in Abuja was at issue in their appeal, but despite numerous questions asking them to explain the reasons that they believed that they could not relocate there, they still did not mention that they had an uncle based there who was a high-ranking member of the military, and brother to their main claimed agent of persecution.

[21] Similarly, it was open for the RAD to disregard the newspaper articles on the General for the same reason, particularly as they pre-dated the RPD's refusal.

[22] With respect to the photo, the RAD highlighted that there was "no evidence regarding what event the photograph depicts, where it was taken, and how they obtained it. Further, it [was] unclear who [was] in the picture." The RAD reasonably refused the photograph based on these uncertainties considering it to be of questionable relevance and credibility.

[23] Similarly, I find that the RAD fairly considered the letters from Dr. Oyenuga and J.D.I Alapo and Co. The RAD reasonably concluded that the content of the letters was not new and did not meet the criteria under s. 110(4) as the letters contained information that could have been provided to the RPD prior to refusal. The content relating to the IFAs was also similar in nature to other evidence already before the RPD and discussed in the Applicants' submissions and information. Further, as noted by the RAD, "Dr. Oyenuga, while an academic, does not appear to be an expert on the issue of indigeneship and does not explain the source of his opinions regarding the Chief and his connections." Dr. Oyenuga failed to provide the source of his expertise despite providing a lengthy list of academic achievements and miscellaneous interests and roles.

[24] I do not find the RAD's assessment of the new evidence to be unreasonable.

B. *Did the RAD err in determining that the Applicants have viable IFAs in Port Harcourt and Abuja?*

[25] The two-prong IFA test asks whether the RAD is satisfied: (1) 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 exists; and, (2) that conditions in that part of the country are such that it would not be unreasonable, in all the circumstances, for the claimant to seek refuge

there: *Rasaratnam v Canada (Minister of Employment & Immigration)*, [1992] 1 FC 706, [1991] FCJ No 1256 (FCA) at paras 6, 9-10; *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589, [1993] FCJ No 1172 (QL) (FCA) [*Thirunavukkarasu*].

[26] The Applicants argue that the RAD made three errors in its IFA analysis. First, they assert the RAD erred by failing to consider recent developments in the country condition evidence for Nigeria, documented in the Travel Advisory for Nigeria from February 25, 2021 and the Immigration and Refugee Board's Revocation of the Jurisprudential Guide decision TB7-19851, dated April 6, 2020 [Revocation], and therefore the RAD relied on an outdated National Documentation Package [NDP]. Second, they assert the RAD erred in the first prong of the IFA analysis by requiring the Applicants to prove the agents of persecution would locate them, by placing too high an evidentiary burden on the Applicants, by expecting the Applicants to live in hiding, and by not considering state protection. Third, they assert the RAD erred in the second prong of the IFA analysis by setting the threshold of unreasonableness too high and by failing to consider the NDP documents and the Revocation.

[27] In my view, none of these arguments establishes that the Decision was unreasonable.

(1) The Revocation

[28] The Applicants argue that the RAD was obligated to consider the Revocation as it concerned the availability of IFAs in southern and central Nigeria based on changing country conditions that came out after the RPD's decision. The Applicants argue that certain documents were removed from the Nigeria NDP immediately following the Revocation.

[29] As noted by the Respondent, the RAD does not refer to the jurisprudential guide in its Decision. The Notice of Revocation of Jurisprudential Guide for TB7-19851 refers to developments in the country of origin information, "including those in relation to the ability of single women to relocate to the various internal flight alternatives proposed in the Nigeria jurisprudential guide, [which] have diminished the value of the decision as a jurisprudential guide". The Applicants do not share this profile.

[30] The jurisprudence indicates that reliance on country condition documents that have been revoked weakens a decision-maker's findings based on that reliance: *Liang v Canada (Citizenship and Immigration)*, 2019 FC 918 at para 10; *Cao v Canada (Citizenship and Immigration)*, 2020 FC 337 at para 38; *Liu v Canada (Citizenship and Immigration)*, 2020 FC 576 at para 74. However, revocation will only be relevant where the decision-maker relies on those documents.

[31] I agree with the Respondent that the Applicant has not provided sufficient evidence relating to the documents removed from the NDP following the Revocation to show how any changes are relevant to the Decision. In oral argument, the Applicant only referred generally to a change in the conditions of individuals to obtain housing and employment. Such general submissions are not sufficient to demonstrate that the changes are material to the RAD's analysis.

[32] On the basis of the evidence before me, I cannot conclude that the Revocation makes the Decision unreasonable.

(2) The First Prong of the IFA Test

[33] The Applicants argue that it was unreasonable for the RAD to require them to provide evidence concerning the means or motivation of the Chief to locate them based on a hypothetical relocation to a city they have never visited. They assert that the Principal Applicant provided sufficient evidence and credible testimony regarding the agents of persecution, including how they wish to circumcise the twins. The Applicants argue that the RAD failed to consider their testimony and to rely on the presumption of truthfulness established in *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (FCA).

[34] The Respondent asserts, and I agree, that there was no expectation for the Applicants to establish how they would be located in the IFA areas, only to show with clear and credible evidence that the possibility of being located by their persecutors in the IFA was serious. As noted by the RAD, the Principal Applicant provided very little information about the Chief and his alleged powers or reach and virtually no information about the other family members involved. Similarly, the Basis of Claim narrative and the other evidence filed by the Applicants gave no detail about the Chief's power and connections and spoke only generally about the family's wish to circumcise the twins. Based on the nature of the evidence, it was open for the RAD to find that the evidence was insufficient to meet the Applicant's burden. As noted in *Lv v Canada (Minister of Citizenship and Immigration)*, 2018 FC 935 at paragraph 42: "[c]redible or reliable evidence is not necessarily sufficient, in and of itself, to establish that the facts set out therein meet the standard of proof of balance of probabilities."

[35] Further, I do not agree that the RAD expected the Applicants to live in hiding or to conceal their identities in the IFA locations by proposing that they use reasonable privacy settings on social media or by noting the large population sizes of Abuja and Port Harcourt. In my view, the RAD reasonably concluded that the Applicants could minimize the possibility of their whereabouts being known by choosing not to broadcast their location on social media. I agree with the Respondent that this was a justifiable proposition based on the RAD's other findings that the Applicants failed to establish that their agents of persecution had the means to pursue them in the IFA. The decisions in *Atta Fosu v Canada (Citizenship and Immigration)*, 2008 FC 1135 and *AB v Canada (Citizenship and Immigration)*, 2020 FC 915 are distinguishable on their facts.

[36] Further, I agree with the Respondent that the RAD was not obliged to consider the issue of state protection as it had already concluded that there was an acceptable IFA: *Kandel v Canada (Citizenship and Immigration)*, 2021 FC 1293 at para 19.

[37] In my view, there is no reviewable error in the RAD's analysis on the first prong of the IFA test.

(3) Second Prong of IFA Test

[38] The Applicant asserts that the RAD set the threshold of unreasonableness too high for the second part of the IFA test and failed to properly consider the Revocation and the NDP documents when assessing the reasonableness of the relocation to Abuja and Port Harcourt.

[39] While I agree with the Applicant that the legal test for this prong of the analysis is that "the claimant cannot be required to encounter great physical danger or to undergo undue hardship in travelling there or in staying there" (*Thirunavukkarasu* at para 14), I do not agree that the RAD misapplied this test in its analysis when it considered undue hardship.

[40] As stated in *Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164, 2000 CanLII 16789 (FCA) at paragraph 15 there is a very high threshold for the unreasonableness test:

> It requires 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. In addition, it requires actual and concrete evidence of such conditions. The absence of relatives in a safe place, whether taken alone or in conjunction with other factors, can only amount to such condition if it meets that threshold, that is to say if it establishes that, as a result, a claimant's life or safety would be jeopardized. This is in sharp contrast with undue hardship resulting from loss of employment, loss of status, reduction in quality of life, loss of aspirations, loss of beloved ones and frustration of one's wishes and expectations.

[41] Contrary to the assertions of the Applicants, the RAD considered the surrounding circumstances, including employment, housing and services, indigeneship status, religion, linguistic, education and work background, but found that these areas did not pose barriers for the Applicants to render Abuja and Harcourt unreasonable.

[42] The Applicants seek to reargue this aspect of the analysis by relying on further documents that extend beyond those that were before the RAD and even those provided in the proposed new evidence (i.e., the Travel Advisory from February 25, 2021). This information was not before the RAD and cannot be considered by the Court.

[43] The RAD considered the country condition documents presented by the Applicants but found that some of the information was not applicable to the Applicants. With respect to other country condition evidence, the Applicants have not identified any aspects of the RAD's analysis that relate to information that has since been revoked.

[44] The Applicants' arguments amount to a request for the Court to reweigh the evidence, which a reviewing Court should not do absent exceptional circumstances (*Vavilov* at para 125). I do not find that such exceptional circumstances exist here.

[45] Overall, I would find the Applicants have failed to demonstrate a reviewable error in the Decision, and it is therefore reasonable.

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

JUDGMENT IN IMM-1392-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"Angela Furlanetto"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	LUKMAN AKOLAWOLE ATOLAGBE, PHAOZIAT MORENIKEJI ATOLAGBE, HANNAT FOLAJOMI ATOLAGBE, HANEEF FOLARIN ATOLAGBE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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