Federal Court  Cour fédérale

Date: 20220616

Docket: IMM-3598-21

Citation: 2022 FC 907

Toronto, Ontario, June 16, 2022

PRESENT: The Honourable Madam Justice Furlanetto

BETWEEN:

ROTIMI BAMISAIYE ASOTUN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a May 6, 2021 decision [Decision] of the Refugee Appeal Division [RAD], upholding the Refugee Protection Division's [RPD] finding that the Applicant is not a Convention refugee or person in need of protection pursuant to sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] because of available Internal Flight Alternatives [IFAs].

[2] The outstanding issues relate to the first part of the IFA test and whether there is an objective forward-looking risk of persecution in the IFAs arising from the Applicant's refusal to accept a chieftaincy title.

[3] As set out further below, I find that the RAD accepted the Applicant's evidence and did not make any veiled credibility or plausibility findings as the Applicant asserts. However, it is my view that the RAD did not provide sufficient justification or a rational chain of analysis for preferring the country condition evidence as it related to the consequences of refusing the chieftaincy. As such, I find the Decision to be unreasonable.

I. Background

[4] The Applicant is a citizen of Nigeria. He is from the Supare Land in Akoko South Government Area of Ondo State. His father was a chief who reported to the King of the Supare Land. The Applicant fears persecution from the elders in his village who have threatened him for refusing a hereditary chieftaincy title in 2014 as it was against his Christian beliefs.

[5] The Applicant was kidnapped and held captive for a number of days in 2014 after refusing the chieftaincy. Between 2014 and 2019, he received threatening phone calls while moving to different locations throughout Nigeria.

[6] The Applicant left Nigeria for the United States in February 2019. He made a refugee claim in Canada in April 2019.

[7] The RPD refused the claim, identifying the determinative issue as the availability of an IFA in Ibadan, Abuja, Benin City, Port Harcourt, Owerri, Ilorin, Enugu and Calabar, Nigeria. It found that there was no evidence regarding the identities of the alleged agents of harm or how they were connected to the Nigerian state. It noted that despite receiving threatening phone calls, there had been no incident of physical contact or harm since 2014. It found that the Applicant had not demonstrated, on a balance of probabilities, that the alleged agents of harm had the motivation and capacity to find him in the proposed IFAs.

[8] The RAD dismissed the Applicant's appeal from the RPD. It found that the determinative issue was the IFAs and not credibility. The RAD found that the RPD erred in finding that the Applicant failed to demonstrate who the agents of persecution were. It also agreed with the Applicant that the RPD had failed to adequately analyze the objective evidence in its assessment of the IFA. On the basis of its own review of the objective evidence, the RAD found that while the chiefs were connected to the state and could have influence with state authorities, those connections and influence did not put a person who refuses to assume a chieftaincy title at risk because "there are no consequences for refusing the chieftaincy." It found that the chiefs or elders had the means through their connections to use state authorities to further harass or harm the Applicant in the locations in which he moved, but had not done so, nor was there any evidence to suggest that they had motivation to locate or harm the Applicant.

II. Issues and Standard of Review

[9] The Applicant raises the following issues in this application:

(a) Are the RAD's conclusions veiled credibility findings that make the RAD's refusal to grant an oral hearing unreasonable?

(b) Did the RAD make plausibility findings with respect to the first part of the IFA test that render the decision unreasonable?

(c) Did the RAD err by not explaining the basis for its preference for the country condition evidence, thus rendering the Decision unreasonable?

[10] 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.

[11] Similarly, the parties submit and I agree, the RAD's decision to not hold an oral hearing, which necessitates consideration of whether the RAD reasonably applied the statutory criteria set out in subsection 110(6) of the IRPA (the tribunal's home statute), is also subject to review on the reasonableness standard: *Mohamed v Canada (Citizenship and Immigration)*, 2022 FC 55 at para 19; *Awonusi v Canada (Citizenship and Immigration)*, 2021 FC 385 at para 10.

[12] 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.

III. Analysis

A. *Are the RAD's conclusions veiled credibility findings that make the RAD's refusal to grant an oral hearing unreasonable?*

[13] The Applicant argues that the RAD made veiled credibility findings that cast doubt on the veracity of the Applicant's testimony and documentary evidence without providing reasons for doing so. He asserts that in the RAD's independent assessment it did not make any credibility findings or provide reasons to disregard the supporting evidence submitted by the Applicant. However, the reasons imply the need for additional corroborating evidence regarding the agents of harm's motivation to find the Applicant and evidence that the chieftaincy title remains vacant. He contends that the RAD's conclusions can only be explained by the RAD placing little to no weight on the Applicant's evidence.

[14] The Respondent asserts that the RAD did not make any veiled credibility findings. Rather, the findings made reflect evidentiary not credibility concerns.

[15] As noted by the Respondent, credibility and sufficiency of evidence are distinct concepts. The fact that evidence is credible does not mean it is sufficient. As stated in *Lv v Canada (Citizenship and Immigration)*, 2018 FC 935 at paragraph 41:

> The term "credibility" is often erroneously used in a broader sense of insufficiency or lack of persuasive value. However, these are two different concepts. A credibility assessment goes to the reliability of the evidence. When there is a finding that the evidence is not credible, it is a determination that the source of the evidence (for example, an applicant's testimony) is not reliable. ... A sufficiency assessment goes to the nature of quality of the evidence needed to be brought forward by an applicant in order to obtain relief, to its probative value, and to the weight to be given to

> the evidence by the trier of fact, bit it a court or an administrative decision-maker. ...

[16] In its reasons, the RAD noted that the RPD did not question the veracity of the Applicant's evidence. It accepted the argument made by the Applicant before the RPD that "the RPD failed to adequately analyze the objective evidence in its assessment of the IFA. Specifically, as it relates to the agents of persecution connection to the state; and their motivation and capacity to find the Appellant in the proposed IFAs." It noted that the documentary evidence was mixed on the amount of influence traditional rulers, like chiefs and kings, had on the state at large in Nigeria. It therefore concluded that it was incumbent on the RPD to clearly explain whether the agents of persecution had influence or connections to the state and as a result of that influence or those connections, means and motivation to pursue the Applicant in the proposed IFAs. The RAD went on to consider the evidence relating to the power and control the chief would have in Nigeria and the consequences of refusing a chieftaincy.

[17] In the RAD's review of the documentary evidence, the RAD commented on the objective country condition evidence and on certain aspects of the Applicant's narrative. The reasons suggest that the RAD accepted the Applicant's evidence, but found it insufficient to establish that the Applicant would be subject to a serious forward-looking risk of persecution in the IFAs. As noted by the RAD:

> The Appellant moved to various cities and the only problems he incurred was threatening phone calls. If the chief or elders or the king were serious about finding the Appellant in those various cities, they could have done so with ease, but they did not. The chiefs or elders had the means, through either their connection to the state authorities or influence with same, to do so as the Appellant had made police complaints about the threatening calls in, almost, every city he moved to. But there is no evidence that the

> chiefs or elders used the police to further harass or harm the Appellant or even locate him in any specific city. Although, the chiefs or elders may have the means to locate the Appellant in the IFA, the evidence shows that they have no motivation to seek the Appellant out. ...

[18] I do not read the RAD's reasons as presenting veiled credibility findings, but rather highlighting what it considered as an insufficiency in the evidence to establish a serious possibility that the Applicant would be persecuted on a forward-looking basis.

[19] The RAD further noted that this is especially so "when there are no consequences for refusing the chieftaincy title and there are many others who are willing to take the title. Then, why would the chiefs, elders, and the King want to pursue the Appellant at all, including in the IFA."

[20] Again, I do not consider this statement to undermine the credibility of the Applicant's evidence relating to his treatment after refusing the chieftaincy or the phone calls he received. Rather, in my view, this comment reflects the RAD's reliance on the objective country condition evidence. As set out further below, while I consider there to be insufficient justification given for the RAD's sole reliance on the country condition evidence and the conclusion reached, I do not consider these comments to reflect veiled credibility findings.

[21] In my view, there was no basis to provide for an oral hearing as the criteria outlined in subsection 110(6) of the IRPA had not been met. While insufficiencies in the evidence were noted, the documentary evidence relied on by the RAD did not raise any new or serious issue as

to the credibility of the Applicant. There is no basis to find the Decision unreasonable for veiled credibility findings or because an oral hearing was not conducted.

B. *Did the RAD make plausibility findings, with respect to the first part of the IFA test, that render the decision unreasonable?*

[22] The Applicant asserts that the RAD made the following plausibility findings that rendered its decision unreasonable: a) that the chiefs or elders would use the police to harass or harm the Applicant or to locate him; b) there are many others who are willing to take the title; c) there are no consequences for refusing the chieftaincy title; and d) it is not logical that the chieftaincy titled would remain vacant.

[23] The Respondent asserts, and I agree, that these findings are not plausibility findings, as they do not ground a rejection of the Applicant's testimony by the RAD because the Applicant cannot be believed.

[24] As stated in *Chen v Minister (Citizenship and Immigration)*, 2015 FC 225 at paragraph 14: "[p]lausibility findings are predicated on a conclusion that the description of events is so unusual or beyond the scope of common experience and common sense that they are disbelieved."

[25] With respect the first alleged finding, I agree with the Respondent that there is a preliminary issue in that the RAD did not state that the chiefs, elders or King *would* use the police to harass, harm, or locate the Applicant. Instead, it concluded that they *could* have used their connection and influence with state authorities, but there was no evidence suggesting they

had in fact done so. This finding does not question the plausibility of the Applicant's narrative. Rather, it accepts the Applicant's testimony that the chiefs are politically connected, but notes that there is no evidence to suggest that the chiefs used such connections to harm, harass, or locate the Applicant.

[26] Similarly, I do not consider the other findings raised to be plausibility findings as none are used to suggest that the Applicant's evidence cannot be believed. While the RAD referred to the country condition evidence to make the remainder of these findings, it did not do so to call into question the Applicant's evidence.

C. *Did the RAD err by not explaining the basis for its preference for the country condition evidence, thus rendering the Decision unreasonable?*

[27] The Applicant argues that the RAD did not explain the basis for its preference for the country condition evidence and as such, there is not rational chain of analysis to explain why the Applicant's evidence was insufficient to establish an objective risk of persecution.

[28] The Respondent asserts that the Applicant's argument amounts to nothing more than an attempt to have the Court reweigh the evidence because it disagrees with the RAD's outcome.

[29] While I agree that the RAD's reasons provide a comprehensive review of the objective country condition evidence, in my view the RAD does not fully resolve that evidence with the evidence given by the Applicant, particularly as it relates to the threats the Applicant has received.

[30] The RAD noted that the objective country condition evidence was mixed as to the consequences for refusing a chieftaincy title. As stated by the RAD:

> While the Chief of Yoruba and Iboland and the Emeritus Professor both note that presently there are no consequences to refusing the chieftaincy title, the Advocate and Development Planner noted that there are serious consequences including threats and murder for refusing the assume the chieftaincy title. [*sic*]

[31] The RAD indicated that it considered the evidence of the Chief of Yoruba and Iboland and the Emeritus Professor to be the most persuasive as:

> The Chief of Yoruba and Iboland would have first-hand knowledge of the consequences for refusing a chieftaincy title. Their evidence is also consistent with other evidence, in the NDP, that if one refuses the chieftaincy title, they can move to a different town with Yorubaland without facing difficulties.

[32] However, the RAD did not discuss the reason for preferring that country condition evidence over the evidence of the Applicant, which is consistent with the evidence from the Advocate and Development Planner.

[33] There is no explanation given for why the RAD concluded, on the basis of the country condition evidence alone, that there are no consequences for refusing the chieftainship, when the Applicant's testimony, which was accepted, demonstrates that the Applicant initially experienced violence and then death threats for refusing the title.

[34] In *Oyewoley v Canada (Citizenship and Immigration)*, 2021 FC 21 [*Oyewoley*] at paragraphs 12, 14-16, the Court considered a claim relating to an applicant who had refused to take on a kingship. In that case, the RAD also relied on the National Documentation Package to

address the consequences of refusing the kingship in the Yoruba tribe, and concluded that although the country condition documents contained mixed information, the vast majority of the sources suggested that the consequences of refusal were minor and did not include death or physical harm. However in *Oyewoley*, the RAD also made findings relating to the insufficiencies in the applicant's evidence and the nature of the threats that the applicant had received, concluding that they were "more about bad karma rather than violence". In doing so, the RAD provided justification for its preference for the country condition evidence over the evidence of the applicant.

[35] In this case, the RAD did not engage with the Applicant's evidence in the same way. While the RAD acknowledged that the Applicant received death threats, it did not explain how it resolved that evidence with the country condition evidence. Instead, it only concluded that there are no consequences for refusing the chieftaincy.

[36] The gap created by this finding results in reasons that when read together, do not reveal a rational chain of analysis (*Vavilov* at paras 102-103). In light of the importance of the RAD's finding that there were no consequences to refusing the chieftaincy to the RAD's conclusion that the Applicant would not be at risk in the IFAs, this gap in the analysis, in my view, renders the Decision unreasonable.

IV. Conclusion

[37] For the foregoing reasons, the application is granted and the Decision will be set aside and sent back to be redetermined by another member of the RAD.

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

JUDGMENT IN IMM-3598-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.

2. The decision of the RAD is set aside and referred back to another member of the tribunal for redetermination.

3. No question of general importance is certified.

"Angela Furlanetto"
Judge

FEDERAL COURT

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