Federal Court Cour fédérale

Date: 20221219

Docket: IMM-5356-21

Citation: 2022 FC 1756

Toronto, Ontario, December 19, 2022

PRESENT: The Honourable Madam Justice Furlanetto

BETWEEN:

GODWIN IDOKO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of the Refugee Appeal Division [RAD] dated July 16, 2021 [Decision]. The Decision confirmed the Refugee Protection Division's [RPD] finding that the Applicant was not a Convention refugee or a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] due to the availability of an internal flight alternative [IFA] in Port Harcourt, Nigeria.

[2] For the reasons set out below, the application is dismissed.

I. Background

[3] The Applicant, Mr. Godwin Idoko, is a citizen of Nigeria. In March 2016, while the Applicant was living away from home, Fulani herdsmen attacked his family farm in Agatu County and killed around 300 people, including the Applicant's father. The Applicant asserts that as he was not present for the attack, he became at risk from the Fulanis.

[4] After spending some time in the United States, the Applicant made a claim for refugee protection in Canada in June 2019, which was refused by the RPD in February 2020. Before the RPD, the Applicant's counsel conceded that his allegations did not establish a nexus to a Convention ground and the RPD only assessed his claim under subsection 97(1) of the IRPA. The RPD concluded that credibility was not determinative and accepted Mr. Idoko's allegations of past harm. However, the RPD relied on the RAD decision in TB7-19851 as a Jurisprudential Guide [JG] and concluded that the Applicant had a viable IFA in Port Harcourt, Nigeria.

[5] On July 16, 2021, the RAD rejected the Applicant's appeal of the RPD decision. The RAD again noted counsel's concession that his allegations did not establish a nexus to a Convention ground for the purpose of section 96 of the IRPA. Like the RPD, the RAD found that credibility was not determinative, but rejected the appeal challenging the availability of an IFA in Port Harcourt.

[6] The RAD noted that the JG used by the RPD had since been revoked and that the National Documentation Package [NDP] for Nigeria had been updated twice. It independently analyzed the IFA without reference to the JG and accepted certain of the new country condition evidence presented by the Applicant. However, the RAD found the Applicant had not established that the Fulani would pursue the Applicant in Port Harcourt. The RAD determined that people of Mr. Idoko's profile were not at a high risk of being kidnapped or targeted in Port Harcourt.

[7] The RAD further concluded that it would not be unreasonable for the Applicant to seek refuge in the IFA location. The RAD noted that Mr. Idoko spoke the official language and was of the dominant religion in the area. It determined that although non-indigeneship can create some barriers to employment, with Mr. Idoko's education and work experience he would be able to find work to pay for housing and healthcare. The RAD concluded that while economic conditions may have become more difficult due to COVID-19, they did not render the IFA unreasonable.

II. Issues and Standard of Review

[8] As a preliminary matter, I note that counsel for the Applicant sought to argue that the Applicant satisfied section 96 of the IRPA at the hearing of this matter. However as noted earlier, a concession was made by Applicant's counsel before the RPD that the Applicant's allegations did not establish a nexus to a Convention ground. As appropriate, this concession was accepted and relied upon by the RPD and the RAD. The analysis will therefore be limited to

subsection 97(1) of the IRPA, which was the only provision argued before the RPD and considered by the RAD.

[9] The Applicant's counsel also sought to raise a procedural fairness argument at the hearing that was not raised in his written memorandum of fact and law, to which the Respondent objected. As noted in *Altiparmak v Canada (Citizenship and Immigration),* 2018 FC 776 at paragraph 11, absent exceptional circumstances, new arguments not presented in a party's memorandum of fact and law should not be entertained as to do so would prejudice the opposing party and leave the Court unable to fully assess the merits of the new argument. I do not consider any exceptional circumstances to apply here and the Court will not consider this additional new argument.

[10] In view of the written memorandum filed, there are four issues arising from this application:

1) Did the RAD err by rejecting some of the Applicant's new evidence?
2) Did the RAD err in its IFA analysis?
3) Did the RPD's reliance on the JG – TB7-19851 taint the Decision?
4) Did the RAD fail to carry out a section 97 analysis?

[11] The parties submit and I agree that the Decision is reviewable on the standard of reasonableness. None of the situations that rebut the presumption of reasonableness review for administrative decisions are present: *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 [*Vavilov*] at paras 16-17.

[12] In conducting reasonableness review, the Court must determine whether the decision is "based on an internally coherent and rational chain of analysis" and 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 reasonable decision, when read as a whole and taking into account the administrative setting, bears the hallmarks of justification, transparency, and intelligibility: *Vavilov* at paras 91-95, 99-100.

III. Analysis

A. *Did the RAD err by rejecting some of the Applicant's new evidence?*

[13] The RAD accepted four of six pieces of new evidence advanced by the Applicant. It accepted items that arose after the RPD's decision that pertained to the changed circumstances in Nigeria due to COVID-19, but rejected travel advisories from the Government of Canada and the US Department of State.

[14] The Applicant asserts that the RAD erred in rejecting the travel advisories. He asserts that the travel advisories discuss the risk of kidnapping in Nigeria, which is relevant to the IFA analysis. The Respondent argues that the Applicant has not explained why these documents are material. It asserts that the advisories are directed to non-essential travel by Canadian or American citizens and therefore relate to a different profile and purpose than what is at issue for the Applicant.

[15] Subsection 110(4) of the IRPA sets out the criteria that must be met for new evidence to be considered on an appeal to the RAD:

Evidence that may be presented	**Éléments de preuve admissibles**
(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	**(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.

[16] Where the requirements of subsection 110(4) of IRPA have been met, the RAD must also assess the credibility, relevance, and materiality of any new evidence before accepting it: *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at paras 43-49.

[17] In its reasons, the RAD identified the legal test for accepting new evidence. It rejected the two pieces of evidence because they were travel advisories directed at Canadian and US nationals and were cautioning against non-essential travel in Port Harcourt. The RAD considered the advisories to be directed to individuals that were not returning citizens and therefore that they were not applicable to the Applicant. I see no error in this part of the analysis.

[18] The RAD accepted that crime and kidnapping were common in Nigeria, including in Port Harcourt. However, it stated that kidnapping victims in Port Harcourt were mainly Westerners

who were oil and gas facility workers. On this basis, it did not consider the risk identified by the advisories to relate to the Applicant's profile.

[19] I agree that the RAD misstates the content of the advisory. The Canadian advisory notes that kidnapping of both foreign and Nigerian nationals occur throughout Nigeria, but that the Westerners who are kidnapped are mainly oil and gas facility workers. However, in my view, even when viewed as written, the advisories do not provide new and material information that was not already provided by the NDP.

[20] I am unable to conclude that the travel advisories would be material to the RAD's analysis, and that there was any error made by the RAD in rejecting these articles for further consideration. As noted by the RAD, there is no basis to find on a balance of probabilities that the Applicant would be at a greater risk of harm, including kidnapping, than other Nigerians living in Port Harcourt.

B. *Did the RAD err by relying on a revoked Jurisprudential Guide?*

[21] The RAD noted that the JG relied on by the RPD had been revoked. It found this was not an error in the RPD's decision, but proceeded to independently analyze the IFA issue without relying on the JG.

[22] The Applicant's argument that the RPD's reliance on a subsequently revoked JG irreparably tainted the Decision has no foundation. The Applicant has not pointed to any part of

the Decision where the JG was referenced by the RAD or where its policies or outlines were followed. In my view, the Applicant has not established a reviewable error on this ground.

C. *Did the RAD err in its IFA analysis?*

[23] The two-prong IFA test is set out in *Rasaratnam v Canada (Minister of Employment & Immigration)*, [1992] 1 FC 706, 1991 CarswellNat 162 (FCA) at paragraphs 6 and 9-10. First, the RAD 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 exists. 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.

[24] With respect to the first prong of the IFA test, the RAD found that the Applicant had not credibly established that the Fulani herdsmen were actively pursuing male children of Agatu farmers or would pursue the Applicant in Port Harcourt. It concluded that the Applicant's evidence had not established that he would specifically be targeted in Port Harcourt because of his family or origin, or for any other reasons. The RAD concluded that the Applicant's evidence did not establish that there was a higher risk to his safety than other Nigerian men of similar age and background or that his agents of persecution would have the means or motivation to find him in Port Harcourt.

[25] The RAD referred to the recent NDP for Nigeria and noted that it indicated that the Niger Delta militia continue to engage in kidnapping and ransom. However, it noted wealthy families, politicians, government official, relatives of celebrities and other high profile groups were most frequently targeted with oil and gas workers being most frequently targeted in Port Harcourt.

While there was a slight increase in kidnapping of non-wealthy, non-high profile individuals, the NDP did not support that individuals with a similar profile to the Applicant would be at risk.

[26] The Applicant argues that the RAD failed to conduct an appropriate analysis. He asserts that the RAD required him to show definite proof that the agents of persecution would be able to locate him instead of the existence of fear that he could be located. He further argues that the RAD failed to address his risk in the IFA despite finding his evidence credible and that the RAD ignored evidence of the Fulani herdsmen's activity throughout Nigeria, including in Port Harcourt.

[27] In my view, the Applicant has not identified a reviewable error in the RAD's analysis. The RAD reasonably focused its analysis on the question of whether the Applicant had established that he would be at risk in the IFA. The RAD did not require the Applicant to show that harm was bound to occur, but found the Applicant had not met his burden of showing that he would be targeted or pursued in Port Harcourt.

[28] In oral submissions, the Applicant's argument appeared to focus on a section 96 analysis, rather than an analysis under section 97 of the IRPA. As noted earlier, the Applicant conceded before the RPD that section 96 did not apply to the facts of his claim. In my view, the comments made in *Sadiq v Canada (Citizenship and Immigration)*, 2021 FC 430 at paragraphs 46 to 48 apply equally well to this case:

> [46] Turning, now, to the first ground on which the applicants challenge the RAD's decision, they submit that the RAD erred in requiring the applicants to "establish" that they would personally be at risk of cruel and unusual treatment or punishment or would

> be in danger of torture. They submit that the RAD erred in the same way as was identified in *Lawal v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 301 at para 10. There Justice Brown concluded that, by using the word "establish", the decision maker had erroneously increased the burden on the claimants by requiring them to prove that they would be at risk in the IFA in order to discharge their onus under the first prong of the IFA test. In the present case, the applicants submit that the RAD likewise effectively required them to provide proof that harm "would definitely occur" in order to show that the first prong of the IFA test was not satisfied and this is a reviewable error.
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> [47] I do not agree that the RAD's reasons bear the interpretation the applicants seek to attribute to them or that the RAD erred as the applicants submit. *Lawal* is distinguishable because it concerned a claim for protection under section 96, where the issue is whether there is a serious possibility of persecution. In the present case, the RAD, like the RPD, limited its consideration of the claims to subsection 97(1). The applicants have not suggested that this was an error. The RAD properly focused its assessment of risk under the first prong of the IFA test on the risks identified in subsection 97(1) as determined in accordance with the onus and standard of proof applicable to claims for protection under that provision. I agree with the respondent that the RAD's use of the term "establish" in the decision simply reflects the onus of proof, which rested on the applicants. I also agree that the term must be understood with reference to the applicable standard of proof. Standing on its own, it does not dictate any particular standard of proof.
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> [48] The RAD did not misunderstand the legal test under the first prong of the IFA test. It understood correctly that the onus was on the applicants to show that they would be at risk in the proposed IFA. It also understood correctly that this issue was to be determined on the standard of a balance of probabilities. This standard was reiterated at every key juncture of the RAD's analysis. The RAD did not erroneously increase the burden on the applicants to show that they did not have an IFA. The question of whether a risk is a serious possibility in the IFA only arises with respect to claims under section 96 of the *IRPA*. The RAD did not err in not addressing that question under the first prong of the IFA test.

[29] The remainder of the Applicant's arguments under this prong amount to a request for this Court to reweigh the evidence. The Applicant points to various pieces of evidence from the

NDP that he says demonstrates that the Fulani herdsmen operate throughout Nigeria. While the Applicant asserts that this evidence demonstrates that the Fulanis are active in southern Nigeria, where Port Harcourt is located, none of the country condition evidence cited suggests that the Fulani herdsmen are active in Port Harcourt, or even the Rivers State in which it is located. Nor does it demonstrate that the Fulanis have strong or extensive connections in Port Harcourt or other big cities. Rather, it suggests that the primary conflicts are due to the use of land or theft of cattle. In my view, the Applicant has not established that the country condition evidence contradicts the RAD's findings.

[30] Similarly, the Applicant has not pointed to any country condition evidence that establishes that the Applicant would be subject to a high risk of kidnapping in Port Harcourt. While the RAD acknowledged that the country condition evidence showed a slight increase in the kidnapping of non-wealthy, non-high profile individuals, it concluded that the evidence still indicated that the Applicant did not have a profile that would be subject to a high risk of kidnapping. The Applicant has not established that the RAD made an error in coming to this conclusion.

[31] On the second prong of the IFA test, the Applicant asserts the RAD failed to address discriminatory practices based on indigeneship and misapplied the second prong test.

[32] As noted 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, which requires an applicant to show "conditions which would jeopardize

the life and safety of a claimant in travelling or temporarily relocating to a safe area" as well as concrete evidence of those conditions.

[33] The Applicant has not identified an error in the RAD's assessment of the barriers associated with non-indigeneship that will face the Applicant in Port Harcourt. The country condition evidence cited by the Applicant does not differ in substance from the evidence cited by the RAD. This evidence acknowledges that there is preferential treatment given to indigenes in various areas, particularly employment. However, the documents also state that indigeneship is less important in big cities including Port Harcourt and employment opportunities appear only to be limited in political or government roles. While the Applicant refers to the European Asylum Support Office report, which notes that there is violence between indigenes and non-indigenes, the report notes that this generally occurs in northern states. In my view, the Applicant's arguments again amount to asking the Court to reweigh the evidence, without identifying an error or engaging with the RAD's reasons for its decision.

[34] The Applicant's further reliance on *Haastrup v Canada (Citizenship and Immigration)*, 2020 FC 141 [*Haastrup*], is also not persuasive. While *Haastrup* provides an example where an IFA in Port Harcourt was found to be unreasonable, I agree with the Respondent this was based on a distinct set of facts that are not present in this case. *Haastrup* involved a single mother with documented mental health issues who did not speak the language of the IFA, and was returning to Port Harcourt with a child with ADHD. The country condition evidence spoke to the challenges single females faced, particularly if the female was uneducated, as the applicant was

in that case. While this case addressed the relevant IFA, the drastically different circumstances of the applicant, in my view, renders it of little use in this context.

D. *Section 97 analysis*

[35] The Applicant's remaining argument that the RAD failed to conduct the personalized risk assessment required under section 97(1) of the IRPA is also not persuasive.

[36] The entirety of the RAD's reasons are focused on the Applicant's personal profile and risk to him. The RAD accepted the Applicant's evidence regarding the events with the Fulani herdsmen, but concluded that there was insufficient objective evidence to demonstrate he would continue to be subject to a personalized risk in the IFA. I see no error in this analysis.

[37] For all of these reasons, it is my view that the application should be dismissed.

[38] There was no question for certification raised by the parties and I agree none arises in this case.

JUDGMENT IN IMM-5356-21

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. There is no question for certification.

"Angela Furlanetto"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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