Federal Court  Cour fédérale

Date: 20230303

Docket: IMM-719-22

Citation: 2023 FC 302

Ottawa, Ontario, March 3, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

AYODELE OPEYEMI FASHUBA
KIKELOMO ABOSEDE FASUBA
OLUWAFELA OMOFELA NELSON FASUBA (A MINOR)
ALEXANDRIO BOLUWATIFE FASUBA (A MINOR)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants seek judicial review of a decision of the Refugee Appeal Division ("RAD") dated January 6, 2022, confirming the determination of the Refugee Protection Division ("RPD") that the Applicants are neither Convention refugees nor persons in need of

protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[2] The RAD found the determinative issue to be the availability of an internal flight alternative ("IFA") in Port Harcourt, Nigeria. The Applicants submit that the RAD unreasonably assessed the issue of the IFA by failing to conduct a total and adequate analysis of the evidence.

[3] For the reasons that follow, I find that the RAD's decision is unreasonable. This application for judicial review is therefore granted.

II. Facts

A. *The Applicants*

[4] Ayodele Opeyemi Fashuba (the "Principal Applicant"), Kikelomo Abosede Fasuba (the "Associate Applicant"), and their two sons (collectively the "Applicants") are all citizens of Nigeria. The Principal Applicant and Associate Applicant also had a daughter, who is now deceased. The Applicants resided in Ado-Ekiti in Ekiti State, Nigeria.

[5] The Principal Applicant travelled to the United States ("US") on September 6, 2017 and returned on September 26, 2017. Once he returned to Ado-Ekiti, the Principal Applicant learned that his daughter had been subjected to female genital mutilation ("FGM") at the hands of Chief Eyeowa, Akande Mary, and Chief Bello Ibrahim (the "traditionalists"). As a result, their daughter became ill and passed away on September 16, 2017.

[6] The Principal Applicant claims he expressed his concern to the traditionalists, but they did not take responsibility for his daughter's resulting illness and claimed that his daughter was sick because she was "possessed with evil spirit." The Principal Applicant reported the FGM to the police, to no avail. The police report angered the traditionalists, after which they threatened to kill his family.

[7] The Principal Applicant claims that this caused him to flee his community in Ado-Ekiti and relocate temporarily to Lagos. The traditionalists located him in Lagos, which stoked his fear and encouraged him to leave Nigeria for the US. The Applicants had already secured visas for the US for medical treatment for their daughter, before her death.

[8] The Applicants arrived in the US on December 9, 2017. The Principal Applicant returned to Nigeria for a brief period in January 2018. While the Principal Applicant's Basis of Claim ("BOC") form states that he returned to care for his ill father, the RPD's decision noted that he returned to care for his ailing father. He returned to Ado-Ekiti to find that his workshop had been emptied and the traditionalists were looking for him.

[9] The Applicants arrived in Canada on August 1, 2018. The Applicants made claims for refugee protection on the basis that they fear persecution at the hands of the traditionalists. On November 20, 2020, while in Canada, the Applicants' home in Lagos was ransacked by unknown men.

B. *RPD Decision*

[10] In a decision dated July 9, 2021, the RPD found that the Applicants were not Convention refugees or persons in need of protection as per sections 96 and 97 of the *IRPA*, on the basis that they had a viable IFA in Abuja, Ibadan, Port Harcourt, or Benin City.

(1) Credibility

[11] The RPD made several negative credibility findings based on inconsistencies in the Applicants' BOC forms and testimony. I do not outline the entirety of the RPD's credibility findings, given that the RPD found the determinative issue to be the availability of an IFA, and the RAD's analysis was limited to the IFA issue. In sum, the RPD found that the Principal Applicant's explanation for his trip back to Nigeria in September 2017, and again in January 2018, was not reasonable and demonstrated a lack of subjective fear, given the ongoing fear of the traditionalists and for his daughter's health. The RPD also found that the Principal Applicant and Associate Applicant failed to provide reasonable explanations for discrepancies regarding where they lived in Nigeria, and found that, on a balance of probabilities, the Applicants had only two residences: one in Ado-Ekiti and one in Lagos. The RPD further noted that the affidavit provided by the Applicants' family friend, Thomas Rufai ("Mr. Rufai"), was insufficient to overcome concerns regarding the Applicants' narratives. The RPD concluded that the Applicants' alleged risk was overall unclear and there was insufficient evidence to establish that the risk would rise to a level of persecution or harm as per sections 96 or 97 of the *IRPA*.

(2) IFA

[12] The test for assessing an IFA requires that: (1) there is no serious possibility of persecution or risk of harm in the IFA, and (2) it is reasonable in the applicant's circumstances to relocate to the IFA (*Rasaratnam v Canada (Minister of Employment and Immigration) (C.A.)*, [1992] 1 FC 706) ("*Rasaratnam*"). The second prong of the test places a high evidentiary burden on the applicant to demonstrate that relocation to the IFA would be unreasonable (*Ranganathan v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1367).

[13] On the first prong, the RPD found that the Applicants do not face a serious possibility of persecution or risk of harm in Abuja, Port Harcourt, Benin City, or Ibadan. Although the Applicants claimed that the traditionalists have influence over police officers and politicians, and can therefore track the Applicants' location without recourse, the RPD found insufficient evidence to establish this claim, and noted that the Principal Applicant's testimony regarding the traditionalists' reach was vague and speculative. The RPD further found insufficient evidence to establish the traditionalists' motivation for seeking out the Applicants in an IFA, noting that the Principal Applicant had returned to Ado-Ekiti, was able to meet his father and arrange for care for him, which the RPD found showed a lack of resolve from the traditionalists in seeking them out. For these reasons, the RPD determined that the Applicants proffered insufficient evidence to establish that the traditionalists in Ado-Ekiti have the means or motivation to locate and harm them in any of these cities.

[14] The RPD also found that the Associate Applicant did not face a serious possibility of gender-related risk or persecution in the proposed IFAs. Noting that gender-based violence is a widespread issue in Nigeria, the RPD found insufficient evidence to indicate that the Associate Applicant would be personally subject to this violence in the IFAs. The RPD then considered the Applicants' submission that the prevalent crime in Nigeria posed a risk to their safety. While acknowledging that the objective evidence supports the claim that widespread crime, kidnapping, corruption and extortion creates a dangerous situation in Nigeria, the RPD ultimately found that this is a concern shared by Nigerians generally, and the Applicants provided little evidence to indicate that this risk is particularized to the Applicants.

[15] On the second prong of the test, the Applicants submitted that it would be unreasonable for them to relocate to the potential IFAs as they each have different languages and tribes, which would be a barrier to their integration and progress in the community. The RPD noted that Nigeria is a large country, Nigerians have the right to reside in any part of the country, and there are means to travel between the regions. The RPD further noted that the potential IFAs are multi-lingual and multi-ethnic cities where the Applicants could safely establish themselves based on their own circumstances.

[16] The RPD also found that the Principal and Associate Applicants are well placed to obtain employment in the proposed IFAs, based on their education, language proficiency, and work experience. The Principal Applicant has a business in Nigeria and has exhibited adaptability and resourcefulness in finding employment in Canada. The Associate Applicant also has work experience in Nigeria. The two are fluent in English and Yoruba.

[17] For these reasons, the RPD found that the proposed IFAs of Abuja, Port Harcourt, Benin City, and Ibadan do not pose a serious possibility of persecution or risk of harm, and it is reasonable for the Applicants to relocate to any of these cities in their circumstances. The RPD determined that on this basis, the Applicants are not Convention refugees or persons in need of protection under sections 96 and 97 of the *IRPA*.

C. *Decision under Review*

[18] In a decision dated January 6, 2022, the RAD dismissed the Applicants' appeal and upheld the RPD's refusal of their claims on the basis of a viable IFA in Port Harcourt.

[19] Although the RPD had proposed several viable IFAs, the RAD found that only one was necessary, and Port Harcourt was more suitable. The RAD also found it unnecessary to consider the Applicants' credibility, noting that the IFA in Port Harcourt is available to them in any case.

[20] Considering the first prong of the *Rasaratnam* test, the RAD found insufficient evidence to establish that the traditionalists would have the reach or influence to locate the Applicants in Port Harcourt. The Applicants submitted that the traditionalists exhibited their means and motivation to locate them when "thugs" ransacked their home in Lagos, and demonstrated influence with the police when, after the Principal Applicant's police report and their subsequent arrest, they were released shortly thereafter without additional consequences. The RAD noted that when the Principal Applicant returned to Nigeria in January 2018, the traditionalists approached him and expressed their demands, but no action was taken against him or his family. The RAD further noted that the traditionalists only sought to confront the Applicants at their

residence in Lagos when they were directly confronted by Mr. Rufai and "traced" him to Lagos. The RAD found that the traditionalists' attempt to confront the Applicants in Lagos was not taken spontaneously and that the Applicants provided no evidence of any additional attempts made by the traditionalists to contact or locate them. The RAD further found that the Applicants failed to name or identify any politician associated with the traditionalists, and any political influence they have is therefore geographically limited.

[21] The Applicants also submitted that they could easily be located due to the nature of the Principal Applicant's business and the impact of social media. However, the RAD found that the evidence failed to establish that the furniture business was so widely known that it would easily identify the Applicants. The RAD also found that social media can be controlled and kept private if necessary, and doing so is not tantamount to living in hiding.

[22] On the second prong, the RAD considered various factors to assess the viability and reasonableness of the Applicants' relocation to Port Harcourt. The RAD noted that Nigeria is a large country, with established means of domestic and international travel, which mitigates in favour of the viability of transiting to the IFA. The Associate Applicant would be accompanied by her husband, the Principal Applicant, mitigating any gender-based barrier she might face in transiting to the IFA.

[23] The RAD found that the Applicants are fluent in English and Yoruba, both of which are spoken in Port Harcourt, suggesting that language is not a barrier to relocation. The RAD further found that despite the documentary evidence indicating a high unemployment rate in Nigeria

generally, both the Principal and Associate Applicants have completed post-secondary education and have meaningful work experience, placing them in a better position to secure employment in Port Harcourt upon their relocation. The RAD acknowledged that it can be more difficult for non-indigenous migrants to access the same opportunities, but found that, according to the documentary evidence, any such limitation did not exist in most cosmopolitan and urban Nigerian cities, and was confined to certain fields of work in which the Applicants are not involved.

[24] The Applicants previously found accommodation in Lagos when it was necessary to flee Ado-Ekiti, which the RAD found to demonstrate that securing accommodation in the IFA would not be unreasonable or unduly harsh. On the issue of elevated crime in Nigeria, the RAD agreed with the RPD that this is a generalized risk for all Nigerians, and that there is no evidence to indicate that the Associate Applicant would be subject to gendered violence. The RAD did not find the Applicants' religious identity or the issue of medical and mental health care to be relevant factors in the Applicants' case.

[25] Considering these factors cumulatively, the RAD found that the Applicants' relocation to Port Harcourt would be reasonable in their circumstances and, therefore, they are neither Convention refugees nor persons in need of protection on the basis of a viable IFA.

III. Issue and Standard of Review

[26] The issue in this application is whether the RAD's decision is reasonable.

[27] The standard of review is not disputed. The parties agree that the applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25) ("*Vavilov*"). I agree.

[28] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[29] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep" (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 36).

IV. Analysis

[30] The Applicants submit that the RAD erred in its assessment of the IFA, rendering its decision unreasonable, while the Respondent maintains that the RAD carried out a reasonable IFA analysis on the basis of the available evidence. In my view, the RAD's decision is unreasonable.

[31] The Applicants submit that the RAD unreasonably blamed the traditionalists' efforts to locate them at their Lagos residence on Mr. Rufai, as this justification is based on a misapprehension of the evidence and paints the traditionalists as merely responding to Mr. Rufai's confrontation. In so doing, the Applicants submit that the RAD ignored the key point, which is that they are victims of unprovoked pursuit by the traditionalists, even upon their relocation to Lagos from Ado-Ekiti. The Applicants contend that this fact is not changed by whether or not the traditionalists were provoked by confrontation or acted spontaneously.

[32] The Applicants further submit that both the RAD and the RPD unreasonably ignored Mr. Rufai's sworn statement that the traditionalists demanded that the Applicants perform "blood cleansing on the community" and the corresponding evidence that ritualistic killings are a prevalent practice in Nigeria. The Applicants submit that the RAD also failed to properly assess their evidence relating to the widespread corruption in Nigerian police forces, which is not limited to a certain geographic region. The Applicants note that the Principal Applicant justifiably lost trust in the police. This is substantiated by his father's petition letter to the Commissioner of Police, stating, "it is strange that the police can be bought over by the accused

and team up with them," and by Mr. Rufai's sworn statement that the police force is "unable to protect" the Applicants in Nigeria. The Applicants submit that on the basis of this evidence, it is unreasonable for the RAD to find that the traditionalists' means to pursue them does not extend to the IFA. Regarding political influence, the Applicants submit that the evidence clearly shows that ritualistic murders have a higher chance of remaining unprosecuted due to the possible intervention of powerful personalities.

[33] On the RAD's conclusion that the evidence does not establish that their business would expose them to greater harm from the traditionalists, the Applicants submit that this is based on a misapprehension of the evidence. The evidence shows that the Principal Applicant's late father was a prominent person in the community, and that when individuals relocate to another location, they tend to establish proximity with their tribesmen for communal support in the new region, which would necessarily identify the Applicants' family in the IFA.

[34] The Applicants also submit that although the RAD noted the various means of travel to Port Harcourt, it failed to consider how this accessibility would make the Applicants more susceptible to easy pursuit by the traditionalists, even upon relocation. The Applicants submit that the RAD's consideration of other factors relating to the viability of relocation to the IFA was based on speculative reasoning and failed to adequately consider the Applicants' particular circumstances.

[35] The Respondent maintains that the RAD reasonably found that the Applicants have a viable IFA in Port Harcourt. On the first prong of the test, the Respondent submits that the

Applicants' assertion that the traditionalists have the means and motivation to locate them in Port Harcourt is based on speculation and is unsupported by the evidentiary record. The Respondent contends that the RAD reasonably found that the traditionalists did not exhibit interest in pursuing the Applicants during the two-year span between 2018 and 2020 and the RAD's conclusion that the traditionalists only pursued them due to Mr. Rufai's confrontation is not misplaced blame but, rather, indicative of their limited interest in pursuing the Applicants.

[36] The Respondent submits that the general evidence regarding ritualistic killings performed by traditionalists, police corruption, and other country condition evidence, does not render the RAD's decision unreasonable. The Respondent further submits that the Applicants' assertions regarding the traditionalists' ties to unnamed politicians is not tantamount to evidence that they have the means to locate the Applicants in Port Harcourt, and the lack of arrests following the alleged ransacking of the Applicants' Lagos residence does not show that the traditionalists have police influence.

[37] On the second prong of the test, the Respondent submits that the RAD intelligibly and thoroughly considered multiple factors and the totality of the available evidence in finding that relocation to Port Harcourt is reasonable in the Applicants' circumstances. The Respondent submits that the Applicants' submissions amount to a disagreement with the RAD's conclusion and fail to point to a reviewable error in its decision to refuse the Applicants' claim on the basis of a viable IFA.

[38] I agree with the Applicant that the RAD's assessment of the IFA in Port Harcourt is unreasonable and warrants this Court's intervention. I find that the RAD's determination that the Applicants failed to provide sufficient evidence to establish the traditionalists' means or motivation to pursue the Applicants in Port Harcourt was made without regard to the full record of evidence proffered by the Applicants on appeal.

[39] The Applicants rightly note that by attributing the traditionalists' pursuit of them at their Lagos residence to Mr. Rufai's confrontation, the RAD accepted and did not dispute that the traditionalists were motivated to pursue them and had the means to do so. I find that regardless of whether the traditionalists were provoked by Mr. Rufai's confrontation, this evidence shows that the traditionalists pursued the Applicants in Lagos. This points directly to the traditionalists' ability to locate them in other parts of Nigeria such as Port Harcourt. The RAD's reasoning on this point therefore lacks a rational chain of analysis.

[40] I further agree with the Applicants that the RAD unreasonably equated the traditionalists' lack of further attempts to contact the Applicants with the conclusion that no harm awaited them upon return to Nigeria. The evidence shows that the traditionalists were informed that the Applicants had relocated to Canada, making it an irrational line of reasoning that their failure to further seek the Applicants in Nigeria would amount to a lack of reasonable harm in the IFA.

[41] For these reasons, I find that the RAD conducted an unreasonable assessment of the IFA, rendering its decision unreasonable as a whole.

V. Conclusion

[42] This application for judicial review is granted. The RAD's decision to refuse the Applicants' claims for protection on the basis that they have a viable IFA in Port Harcourt is unreasonable. No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-719-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted. The decision under review is set aside and the matter remitted back for redetermination by a differently constituted panel.

2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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