Federal Court  Cour fédérale

Date: 20230414

Docket: IMM-2447-22

Citation: 2023 FC 544

Ottawa, Ontario, April 14, 2023

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

DAN DAVID AJAGU
HAWAWU JUMAI DAN AJAGU
IFECHUKWU CHURCHILL AJAGU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a Refugee Appeal Division [RAD] decision, dated February 21, 2022, dismissing the Applicants' appeal of the Refugee Protection Division's [RPD] decision to deny their claims for refugee protection.

[2] For the reasons that follow, I find the Decision is reasonable and I will dismiss this application.

II. **Background**

[3] The Applicants, a married couple and their minor son, are citizens of Nigeria. They allege a risk of persecution on the ground of their religion at the hands of the Associate Applicant's (AA's) family members. The origin of the threats against them stem from the AA's conversion to Christianity and subsequent marriage to a Christian man, the Principal Applicant (PA).

[4] On April 6, 2018, the Applicants arrived in Canada and initiated a claim for refugee protection.

[5] On October 6, 2021, the RPD rejected the Applicants' claims after finding that they had a viable internal flight alternative [IFA] in Enugu State.

[6] On appeal, the RAD determined that the RPD's findings with respect to an IFA in Enugu State were correct. It concluded that the Applicants are neither Convention refugees nor persons in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act* [*IRPA*].

III. **Decision under Review**

[7] The RAD made the following findings which were central to the IFA analysis:

a. With respect to the first prong of the IFA test, the Applicants failed to establish that the agent of persecution has either the means or the motivation to pursue the Appellants in the proposed IFA of Enugu. While the Applicants claimed that the agent of persecution was a member of Islamic Jihadists (IJ), they were unable to provide any evidence to support the allegation.

b. With respect to the second prong, the Applicants failed to establish why they would not be able to find an alternative line of employment. The RAD found that the Applicants have diverse employment histories, are highly educated, speak the local languages and have transferrable skills so they would not be at a disadvantage in Enugu.

IV. **Issues and Standard of Review**

[8] In this judicial review, the parties agree, as do I, that the appropriate standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[9] The Applicants argue that the RAD decision is unreasonable asserting that: i) the RAD erred in rejecting new evidence tendered by the Applicants; ii) the RAD erred in not granting the Applicants an oral hearing and, iii) the RAD erred in its IFA analysis.

[10] A court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker. It does not attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem: *Vavilov* at para 83.

[11] 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. The reasonableness standard requires a reviewing court defer to such a decision: *Vavilov* at para 85.

[12] The decision maker may assess and evaluate the evidence before it. Absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *Vavilov* at para 125.

V. **Analysis**

A. *New evidence*

[13] The Applicants sought to tender eight items as new evidence in support of their appeal to the RAD. All of the items were news articles.

[14] The RAD accepted five of the eight articles which post-dated the RPD decision and were found to be credible, trustworthy, and relevant to the situation in Enugu state and violence against women.

[15] The RAD rejected three of the articles because they could have been disclosed prior to the RPD rendering its decision on October 6, 2021. Two of the articles at issue were dated April 5th, 2021 and the third was dated August 5th, 2021.

[16] The Applicants submit that the RAD erroneously rejected the three news articles because they post-dated the conclusion of the second RPD hearing held on March 17, 2021.

[17] However, the jurisprudence is clear that under subsection 110(4) of the *IRPA*, new documentary evidence is only admissible in a RAD appeal if it (a) arose after the rejection of a claim by the RPD, (b) was not reasonably available, or (c) was reasonably available but the person could not reasonably be expected in the circumstances to have presented [it], at the time of the rejection: *Canada (Minister of Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 34 (*Singh*). [my emphasis]

[18] I am not persuaded that the RAD erred in refusing to admit the three articles that pre-date the RPD's rejection of the claim. The Applicants failed to establish that at the time of the RPD's rejection, the documents were not reasonably available or the Applicants could not reasonably have been expected to present them.

[19] I note that two of the news articles pre-dated the RPD's decision by approximately six months, and the other pre-dated it by two months.

[20] Finally, as the Respondent points out, the Applicants had an opportunity to file post-hearing submissions on the issue of IFA, which they did on June 24, 2021. Certainly, at that point, the first two articles dated April 5th, 2021 were reasonably available to the Applicants and could have been disclosed with their post-hearing submissions.

[21] I find, based on the foregoing, that the RAD reasonably excluded the documents for failing to meet the admissibility requirements of section 110(4) of the *IRPA*.

B. *The RAD's refusal to hold an oral hearing*

[22] The Applicants assert that the RAD provided insufficient reasons for declining to hold an oral hearing.

[23] The RAD's reasons on this point can be found at paragraphs 13-14 of the Decision. The RAD correctly identified the tripartite test under subsection 110(6) of the *IRPA,* and found that the new evidence admitted did not "meet the requirements of this section".

[24] I note that the RAD is not required to hold an oral hearing simply because it admits new evidence. Subsection 110(3) of the *IRPA* sets out that the RAD must proceed without an oral hearing. Subsection 110(6) is an exception to the rule. The tripartite criteria must be met and even then, the RAD can still opt not to hold a hearing: *Singh*, at para 71.

[25] Further, the Respondent correctly submits that the credibility of the Applicants was not at issue in this case and the Applicants failed to establish how their new evidence met the legislative requirements for holding an oral hearing.

[26] In light of the above-noted legal and factual constraints that bore on the Decision, I find, as required by *Vavilov*, that the reasons, which are intelligible and transparent, provide sufficient justification for the RAD's refusal to hold an oral hearing.

C. *IFA*

(1) Updated National Documentation Package

[27] On judicial review, the Applicant raised as a "preliminary issue" under the issue of IFA, that the RAD unreasonably found the RPD's reliance on an updated June 30, 2021 version of the Board's National Documentation Package (NDP) for Nigeria did not constitute a breach of procedural fairness.

[28] Specifically, the RAD held that the RPD did not breach procedural fairness in relying on the updated package because the RPD is required to assess the reasonableness of a potential IFA in light of the best and most current information available at the time, citing the Immigration and Refugee Board's Policy on National Documentation Packages in Refugee Determination Proceedings. The RAD also noted that the Applicants were represented by counsel who is or should be aware that the NDP is regularly updated and as such, they could have made amended submissions on the updated package before the decision was rendered.

[29] While I find the RAD's reasoning on this point to be somewhat problematic, it is not sufficient to render the entirety of the Decision unreasonable.

[30] As a general rule, a decision-maker breaches its duty of fairness by relying on documentary evidence that a claimant is not aware of, nor deemed to be aware of: *Chen v Canada (Minister of Citizenship and Immigration)* (T.D.), 2002 FCT 266, [2002] 4 FC 193, at paras 33-34.

[31] Further, this Court has held that a Board's reliance on country evidence that was not in the record at the time of the hearing, and which was only published in an NDP post-hearing, may very well constitute a breach of procedural fairness: *Varatharajah v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 149.

[32] However, my finding that the Decision is reasonable turns on the fact that the Applicants have failed to point this court to any material differences between the two packages and have not made any submissions whatsoever on how the undisclosed updated NDP prejudiced the assessment of their claim.

[33] In oral submissions, the Respondent conceded that the RPD's conduct in failing to disclose the updated NDP to the Applicants certainly raised procedural fairness issues. However, the Respondent went to great lengths in comparing the two packages for this Court and showed precisely how the new NDP was relied on by the RPD with detailed references to specific paragraphs and footnotes in the decision. Ultimately, the Respondent states, the differences were immaterial to the outcome of the claim and the Applicants failed to show any prejudice.

[34] In sum, there were four documents added or updated in the June 2021 package: items 1.15, 1.18, 1.32, and 1.34.

[35] The Respondent asserts that the new package was relied on primarily to establish uncontroversial facts about employment, gender discrimination and language profile in the IFA

location. For example, the RPD relied on item 1.15 in finding that the Applicants speak Igbo, which is the language primarily spoken in Enugu state.

[36] In deciding this issue, I find Madam Justice Mactavish's decision in *Ding v Canada (Citizenship and Immigration)*, 2014 FC 820 instructive. In that case, the RPD relied on a document that was no longer found in its NDP. Justice Mactavish found the RPD's failure to put the applicant on notice of its intent to rely on the document was unfair, but ultimately was immaterial to the outcome stating:

> [12] I agree with Ms. Ding that it was unfair for the Board to have relied on the document in question. The whole purpose of a National Documentation Package is to ensure that everyone involved has access to the relevant country condition information, and that refugee claimants are aware of the documents that will be relied upon by the Board. While it was open to the Board member to have had regard to the document in question, fairness required that the Board first put Ms. Ding on notice of its intention to do so and afford her an opportunity to address the document, if she deemed it necessary.
>
> [13] That said, Ms. Ding has not identified any material differences between the 2004 document cited by the Board and the document that replaced it in the current National Documentation Package for China. Accordingly, once again, any breach of procedural fairness that occurred was not material to the result in this case.

[37] Similarly, in this case I find the Applicants failed to demonstrate how the minor differences in the updated NDP in any way affected the assessment of their claim.

[38] I also note that by the time the Applicants filed their appeal to the RAD, they were clearly on notice about the new NDP. In their appeal submissions to the RAD, the Applicants noted the

differences between the two packages but failed to demonstrate how the documents referenced by the RPD were so sufficiently different as to affect the result of their claim.

[39] Based on the foregoing, I find that the Applicants have not met their burden of demonstrating that the RAD's decision ought to be set aside on this basis.

D. *The RAD's IFA Analysis*

[40] When determining whether there is an IFA, the decision maker must consider the two-pronged test developed in *Rasaratnam v Canada (Minister of Employment and Immigration)*, 1991 CanLII 13517 (FCA), [1992] 1 FC 706 (CA) and *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, 1993 CanLII 3011 (FCA), [1994] 1 FC 589 (CA).

[41] On a balance of probabilities, the Board must be satisfied there is no serious possibility of the claimant being persecuted in the part of the country to which it finds an IFA exists; and the conditions in the part of the country considered to be an IFA must be such that it would not be unreasonable, in all the circumstances, including those particular to the claimant, for them to seek refuge there.

[42] The Applicants challenge the RAD's analysis of both prongs of the IFA test.

[43] With respect to the first prong, the Applicants submit that the RAD erred in finding that the agent of persecution, referred to in the Decision as M.B. (M.B.) does not have the motivation or means to locate them.

[44] The RAD's analysis on this point was extensive.

[45] With respect to motivation, the RAD considered the four years that had elapsed between M.B.'s learning of the Associate Applicant's conversion and the attack on the PA. It also considered that after the alleged attack there was a period of silence for approximately seven years before he began texting the PA. The RAD also took note of the fact that the last text message was received by the PA in August 2018, after which the Applicants had no further contact with M.B. or any other members of their family.

[46] With respect to means, the primary issue identified by the RAD was the lack of evidence to establish that the agent of persecution could pursue them to Enugu. The RAD found that the Applicants' assertion of M.B. being a member of IJ was not supported by the evidence. On this point, the RAD considered that the Applicants' only support for this assertion was the PA's testimony recounting a conversation he had with a police officer in 2010. According to the PA, the police officer stated "he has joined Islamic Extremists".

[47] Based on a thorough review of the record, I find the RAD reasonably concluded that the Applicants had "not established that their agent of persecution is currently affiliated with IJ or that he can deploy a nation-wide network to identify them".

[48] Overall, I agree with the Respondent that the Applicants' submissions with respect to the first prong of the IFA test, amount to a disagreement with the RAD's conclusions, and they failed to address the evidentiary deficiencies identified by the RAD.

[49] The Applicants also contend that the RAD erred in its treatment of the second prong of the IFA test. They submit that gender-based violence, the impact of COVID-19, the presence of Boko Haram and other extremists groups in the region, and limited job prospects render the IFA unreasonable.

[50] A review of the Decision shows that the RAD thoroughly and reasonably considered the Applicants' submissions. For example, with respect to the question of employment, the RAD found the following:

> The Appellants have testified that they all speak English, which is the national language of Nigeria. In addition, the PA speaks Igbo, which is widely spoken in Enugu. The adult Appellants are both well-educated and completed their university degrees. They have travelled extensively as can be seen from their passports. They both have diverse employment histories. The AA was employed for over nineteen years in management at Ecobank, a business that has branches in Enugu. In addition, she has work experience as a debt counsellor and mortgage specialist in Canada. The PA was an entrepreneur in the entertainment business, with his own company in video and music. Enugu has a significant presence in the Nigerian film and entertainment industry. I find that the Appellants diverse and transferrable skills would not place them at a significant disadvantage were they to relocate to Enugu.

[51] The RAD also considered the Applicants' submissions with respect to indigeneship and considered a number of demographic factors in coming to its conclusion. Ultimately, it found that as a member of the dominant tribe of Enugu, the evidence was that the Applicants would not be likely to face barriers in accessing housing or education.

[52] In the context of the IFA analysis, it is well established that the threshold for this prong of the IFA test is very high. It requires nothing less than the existence of conditions that 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: *Ranganathan v Canada* (*Minister of Citizenship and Immigration*) (FCA), 2000 CanLII 16789 (FCA), [2001] 2 FC 164 at para 15.

[53] The Applicants' arguments amount to a request for this Court to re-weigh the evidence that was before the RAD. They have failed to reveal any errors in the RAD's analysis under the second prong.

[54] For the foregoing reasons I find the Applicants have not met their onus to show the RAD erred with respect to its IFA analysis under either of the two prongs.

VI. **Conclusion**

[55] The RAD's decision to dismiss the Applicants' appeal was reasonable. I will therefore dismiss this Application for judicial review.

[56] No serious question of general importance was posed nor does one arise on these facts.

JUDGMENT IN IMM-2447-22

THIS COURT'S JUDGMENT is that:

1. This application is dismissed.

2. There is no serious question of general importance to certify.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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