Federal Court  Cour fédérale

Date: 20231129

Dockets: IMM-8299-22
IMM-10278-22

Citation: 2023 FC 1592

Toronto, Ontario, November 29, 2023

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

GODWIN OSAZE IMAFIDON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This Judgment and Reasons addresses the Applicant's applications for judicial review of two decisions of the Refugee Appeal Division [RAD]. In Court file no. IMM-8299-22, the Applicant challenges the decision of the RAD dated August 9, 2022 [RAD Appeal Decision], which dismissed his appeal of the decision of the Refugee Protection Division [RPD] dated

March 17, 2022 [RPD Decision]. Both the RPD and the RAD found that the Applicant, who is a Nigerian national, is not a Convention refugee under section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] or a person in need of protection under section 97 of IRPA, because he has a viable internal flight alternative [IFA] in Abuja.

[2] In Court file no. IMM-10278-22, the Applicant challenges the decision of the RAD dated September 27 2022, which dismissed the Applicant's application to the RAD to reopen his appeal [RAD Reopening Decision].

[3] As explained in greater detail below, these applications for judicial review are dismissed because, having considered the Applicant's procedural fairness arguments surrounding both the RAD Appeal Decision and the RAD Reopening Decision, as well as his arguments related to the reasonableness of the merits of the RAD Appeal Decision, I find no reviewable error in either decision.

II. Background

[4] As explained in the RPD Decision, the Applicant's refugee claim is based on fear of Fulani Herdsmen [Herdsmen] in Edo state, where large portions of his extended family's ancestral farmlands were seized, squatted upon, and unlawfully trespassed upon by armed Herdsmen commencing in 2015. The Applicant worked as a lawyer in Nigeria and led the family's legal battles against the Herdsmen between 2015 and January 2018, when he left Nigeria.

[5] As explained in the Applicant's Basis of Claim form, he fears threats from the Herdsmen for which he was unable to obtain safe protection from the police, alleging that the Herdsmen work in collaboration with the authorities and the president of Nigeria who is also of Fulani ethnicity.

[6] The Applicant's claim was originally rejected by the RPD in a decision dated November 7, 2019, in which the RPD found that he had an IFA in Nigeria. However, the Applicant appealed to the RAD, which allowed his appeal in a decision dated March 6, 2020, on the grounds of procedural fairness, finding that the RPD failed to explore central aspects of this claim. The RAD directed the RPD to re-determine the claim and provided a number of central questions for the panel to ask the Applicant, including exploring the means and motivation of the agents of harm and why the Applicant cannot reasonably relocate to an IFA location.

[7] That re-determination is set out in the RPD Decision, which followed an oral hearing held on February 10, 2022. The RPD found that the Applicant's claim had no nexus with a Convention ground under section 96 of the IRPA and therefore assessed the claim only under subsection 97(1) of the IRPA. The RPD assumed, without deciding, that the allegations in the claim were true, but it found that the Applicant had a viable IFA in Abuja.

[8] Under the first branch of the IFA test, in relation to the Herdsmen's motivation to pursue and harm the Applicant in the IFA, the RPD concluded that, if the Applicant returns to Abuja rather than to Edo state, does not make a claim to the land, and does not dispute the Herdsmen's control of the land, there was insufficient evidence to conclude that the Herdsmen would remain

interested in harming the Applicant. In relation to the Herdsmen's means of locating the Applicant in the IFA, the RPD considered country condition evidence [CCE] and the Applicant's testimony and found that he had not established that the Herdsmen have the capacity to mount a search that would find him in Abuja.

[9] Under the second branch of the IFA test, the RPD considered the Applicant's level of education, employability, fluency in English, and profile as an established lawyer, and found that it was objectively reasonable for the Applicant to relocate to Abuja. The RPD considered the Applicant's testimony that, due to high levels of banditry, kidnapping and insecurity in Abuja, he and his family would be at risk living there. However, while acknowledging the evidence that there was crime in Abuja, the RPD found that the evidence of generalized crime did not meet the high threshold for the unreasonableness test.

[10] The Applicant appealed the RPD decision to the RAD.

III. RAD Appeal Decision

[11] In its analysis in the RAD Appeal Decision, the RAD first addressed an alleged breach of procedural fairness, because the RPD failed to provide an audio recording of the Applicant's February 10, 2022 hearing, as a result of which his appeal was perfected without the benefit of the recording. The RAD cited principles to the effect that a breach of procedural fairness does not necessarily result in relief in every case. Rather, if it is apparent that the decision-maker would have reached the same decision notwithstanding the breach, the decision should stand.

[12] The RAD noted that there were no credibility findings in dispute in the Applicant's appeal and that he had not alleged that the RPD misconstrued his testimony or that there were material factual errors in the RPD Decision. While observing that generally the lack of a hearing recording does constitute a breach of procedural fairness, the RAD concluded that no remedy was warranted, as no purpose would be served in referring the matter back to the RPD, and that the requirements of natural justice had been met.

[13] The RAD then considered new evidence presented by the Applicant on appeal, consisting of a sworn declaration of the Applicant's wife, an affidavit from his brother, and various news articles. The RAD rejected the wife's declaration, as the Applicant had not established that it contained information that was not reasonably available before the RPD Decision. The brother's affidavit was accepted, insofar as it identified a specific event that occurred on March 26, 2022 (after the RPD Decision of March 17, 2022) when the agents of harm raided the ancestral farmland. With respect to the news articles, the RAD noted that some clearly arose prior to the date of the RPD Decision. In relation to other articles, referring to long-standing problems with armed gangs and the intersection between banditry, arms, drugs and terrorism, the RAD concluded that the Applicant did not explain why the substantive content of these articles could not have been provided to the RPD.

[14] Turning to the IFA analysis, the RAD concluded based on the CCE that the farmer-herder violence in Nigeria was at least in part tied to religious differences. As such, the RAD found that the Convention potentially applied. However, in relation to the first branch of the IFA test, the RAD also found that, removed from Edo state and no longer acting as the legal representative of

his family, the Applicant had not provided sufficient evidence to establish that the Herdsmen and/or the authorities had the means and motivation to pursue him in the IFA. In relation to the second branch of the test, the RAD considered the CCE and the Applicant's personal circumstances and concluded that relocation would be objectively reasonable. The RAD acknowledged that there was evidence of escalating crime and banditry in Abuja but found that the security situation did not rise to the level of making relocation unduly harsh in the Applicant's particular circumstances.

[15] Concluding that Abuja was a safe and reasonable IFA, the RAD dismissed the Applicant's appeal.

IV. RAD Reopening Decision

[16] In addition to seeking judicial review of the RAD Appeal Decision, the Applicant applied to the RAD to reopen his appeal, as permitted by Rule 49(6) of the *Refugee Appeal Division Rules*, SOR/2010-257 [Rules], on the basis that there had been a failure to observe a principle of natural justice. The Applicant relied on the fact that neither the RPD nor the RAD had the benefit of a recording of his February 10, 2022 hearing when it made its decision.

[17] In considering the reopening application, the RAD relied on *Antunano Martinez v Canada (Citizenship and Immigration)*, 2019 FC 744 [*Antunano Martinez*], in which the Federal Court stated that neither the applicable legislation nor the case law indicated that there was an obligation upon the RPD to record a hearing (at para 7) and that it was necessary to weigh the

effect of the absence of a recording on the outcome of the case and whether such absence prevented the RAD from addressing the issue properly (at para 12).

[18] The RAD noted that the RAD Appeal Decision addressed the absence of a recording and concluded that, as the availability of an IFA rather than credibility was a determinative issue, the recording would do nothing to change the outcome of the decision and therefore the absence of a recording did not create a breach of natural justice. The RAD concurred with this analysis and dismissed the application to reopen the appeal.

V. Issues and Standard of Review

[19] Taking into account the parties' respective submissions in both applications for judicial review, which include some overlap in the procedural fairness arguments raised in both applications, these applications together raise the following issues for the Court's determination:

A. Was the Applicant deprived of procedural fairness or natural justice in the adjudication of his claim?

B. Is the IFA analysis in the RAD Appeal Decision reasonable?

[20] As suggested by its articulation, and as the parties agree, the second issue is governed by the standard of reasonableness.

[21] In relation to the first issue, which concerns procedural fairness, the identification of the standard of review is more nuanced. The Applicant takes the position that the standard of

correctness applies to all procedural fairness issues he advances in these applications. The Respondent argues that a correctness-like standard applies, but only when the Court is reviewing the fairness of the process adopted by the RAD in making the RAD Appeal Decision. In applying this standard, the Court's focus is whether the process was fair and just in the circumstances (see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*Canadian Pacific*] at para 54; *Chaudhry v Canada (Citizenship and Immigration)*, 2019 FC 520 [*Chaudhry*] at para 24). In my view, for purposes of the present matter, nothing will turn on those different articulations of the standard applicable to the Court's review of the process leading to the RAD Appeal Decision.

[22] However, with respect to the Court's review of the RAD Reopening Decision, the Respondent takes the position that the reasonableness standard applies (see *Brown v Canada (Citizenship and Immigration)*, 2018 FC 1103 at paras 24-25; *Khakpour v Canada (Citizenship and Immigration)*, 2016 FC 25 [*Khakpour*] at paras 19-21; *Aguirre Renteria v Canada (Citizenship and Immigration)*, 2016 FC 996 [*Aguirre*] at para 12; *Atim v Canada (Citizenship and Immigration)*, 2018 FC 695 [*Atim*] at para 31). The Applicant disputes the application of these authorities, arguing that *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] explains that the presumptive standard of reasonableness does not apply to review related to a breach of natural justice and/or the duty of procedural fairness (at para 23).

[23] While *Vavilov* post-dates the above referenced authorities, the Respondent also refers the Court to *Rokisini v Canada (Citizenship and Immigration)*, 2020 FC 575 [*Rokisini*] at paragraph 13, which held that there is no need post-*Vavilov* to depart from this line of authority, as the

application of the *Vavilov* framework also results in selection of the reasonableness standard in reviewing RAD reopening decisions. I find that reasoning sound. For instance, in *Atim*, which involved a judicial review of a decision by the RAD on an application under the Rules to reopen an appeal (see para 33), the Court adopted earlier authorities applying the standard of reasonableness, on the basis that the RAD decision is one of mixed fact and law in which the RAD benefits from the presumption of deference in questions pertaining to the interpretation of its own statute (see *Khakpour* at paras 19-21; *Aguirre* at para 12).

[24] The Respondent also notes that the Applicant's procedural fairness arguments related to the RAD Appeal Decision challenge not only the fairness of the RAD's own process in arriving at that decision but also its consideration of the fairness of the process before the RPD. In the latter context, relying on *Chaudhry* at para 24, the Respondent takes the position that the reasonableness standard applies. This approach has been followed in other post-*Vavilov* decisions (see, e.g., *Ahmad v Canada (Citizenship and Immigration)*, 2021 FC 214, at para 13; *Rodriguez v Canada (Citizenship and Immigration)*, 2022 FC 774, at para 17), and I will adopt it in the case at hand.

[25] In summary, the Court's review of the procedural fairness leading to the RAD Appeal Decision is governed by the correctness standard, while its review of the RAD Appeal Division's consideration of the procedural fairness leading to the RPD Decision is governed by the reasonableness standard. The Court's review of the RAD Reopening Decision's assessment of procedural fairness or natural justice leading to the RAD Appeal Decision is also governed by the reasonableness standard. That said, as will be explained in the Analysis portion of these Reasons, these applications for judicial review must be dismissed even if, as advocated by the

Applicant, the Court were to apply the less deferential correctness standard to all procedural fairness issues.

VI. Analysis

Was the Applicant deprived of procedural fairness or natural justice in the adjudication of his claim?

[26] In challenging both the RAD Appeal Decision and the RAD Reopening Decision, the Applicant argues that he was deprived of procedural fairness or natural justice, because the RPD did not successfully record (or retain a recording) of the RPD hearing, as a result of which neither the RPD nor the RAD had the benefit of such recording (and therefore a record of his oral testimony before the RPD) when making their respective decisions. The Applicant also relies heavily on the fact that he was not definitively informed of this missing or lost record until November 21, 2022, after both the RAD Appeal Decision and RAD Reopening Decision had been made.

[27] Jurisprudentially, the Applicant relies on the statement in *Cardinal v Kent Institution*, [1985] 2 SCR 643 [*Cardinal*], that the denial of the right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would have resulted in a different decision (at p 660). He also references the statement in *Owusu-Ansah v. Canada (Minister of Employment & Immigration)*, [1989] FCJ No 442, 8 Imm LR (2d) 106 at 113 (FCA) [*Owusu-Ansah*] that it is an error in law for an administrative decision-maker not to have had regard to the totality of the evidence properly before it. The Applicant also submits

that, as he was led to believe that the hearing before the RPD was being recorded, his procedural fairness arguments are supported by the doctrine of legitimate expectations.

[28] Turning first to the RAD Appeal Decision, the Applicant's appeal raised what the RAD described as a preliminary issue, whether the RPD's failure to provide an audio recording of the hearing, such that the appeal was perfected without the benefit of such recording, resulted in a breach of procedural fairness. While recognizing that overall the lack of a hearing recording does constitute a breach of procedural fairness, the RAD concluded in the particular circumstances of this case that such a remedy was not warranted and that the requirements of natural justice had been met.

[29] In so concluding, the RAD relied on jurisprudence requiring an applicant to demonstrate that a breach of procedural fairness was material to the tribunal's decision (see *Roy v Canada (Citizenship and Immigration)*, 2013 FC 768 at para 34) and noted, among other observations, that there were no credibility findings in dispute in the RPD Decision and that the Applicant had not alleged that the RPD misconstrued his testimony or that there were material factual errors in the RPD Decision.

[30] In defending this analysis, the Respondent relies on jurisprudence explaining that the failure of a tribunal to record its proceedings does not in itself constitute a denial of procedural fairness. Absent a statutory right to a transcript, a Court sitting in judicial review must determine whether the record before it allows it to properly dispose of the application (see *Nweke v Canada (Citizenship and Immigration)*, 2017 FC 242 [*Nweke*] at paras 34-35). *Antunano Martinez v.*

Canada (Citizenship and Immigration), 2019 FC 744 [*Martinez*] applies this principle to the work of the RAD when considering an appeal from an RPD hearing that was not fully recorded (at para 120).

[31] Importantly, this Court has also explained that an applicant asserting procedural unfairness in such a circumstance must raise an issue affecting the outcome of the case that can only be determined on the basis of a record of what was said at the hearing. The applicant must identify the information missing from the recording and explain how this is determinative in resolving an issue central to the claim (see *Ait Elhocine v Canada (Citizenship and Immigration)*, 2020 FC 1068 [*Ait Elhocine*] at para 29).

[32] I understand the Applicant to argue that the Court should prefer the guidance of the Supreme Court of Canada in *Cardinal* and the Federal Court of Appeal in *Owusu-Ansah*, rather than the lower court authorities. While I accept the principles in the decisions upon which the Applicant relies, as well as the role that the doctrine of legitimate expectation can have in guiding the review of procedural fairness, these represent general principles that require nuanced application to the facts of particular cases. The authorities upon which the Respondent relies have more specific application to the circumstances now before the Court.

[33] The Applicant also argues that these authorities are distinguishable, because *Martinez* involved a recording that was missing only counsel's submissions (see para 12) and *Nweke* (see para 21) and *Ait Elhocine* (see para 27) involved recordings with only missing portions. He contrasts those circumstances with the case at hand, in which the entirety of his oral testimony

before the RPD was unavailable to both the RPD and the RAD when making their decisions. I accept that the extent of the deficiency in recording a hearing may be relevant to the required analysis, as it may affect the ease with which an applicant can meet the burden described in *Ait Elhocine*. However, I find that the principles set out in *Ait Elhocine* and the other authorities still apply.

[34] The Applicant's written submissions to the RAD in support of his appeal demonstrate that he alleged procedural unfairness because he had not been provided with a recording of the RPD hearing and had therefore perfected his appeal without the benefit of a recording. However, he did not advance submissions identifying in any detail the evidence that was therefore missing or how it would be determinative of either his claim or his appeal.

[35] In performing this portion of the analysis, I am conscious of the Applicant's argument that, when he was preparing his appeal submissions and indeed up to the point the RAD released the RAD Appeal Decision, he had not yet been advised that there was no recording of the RPD hearing, even though documentation in the Certified Tribunal Record indicates that the RPD had advised the RAD of this fact months before. On this basis, he argues that he was deprived of the opportunity to advance evidence or submissions identifying the details of the missing evidence and its significance.

[36] I have some difficulty with this argument. I accept that the correspondence from the RPD, definitively advising the Applicant of the missing or lost recording, was not received until November 21, 2022, after the date of the RAD Appeal Decision. However, it is clear from his

appeal submissions to the RAD that, when advancing his appeal, he was questioning whether or not the hearing had in fact been recorded.

[37] More importantly, the Applicant has clearly been aware of this fact since November 21, 2022, and yet his evidence and submissions in his application for judicial review of the RAD Appeal Decision also fall significantly short of the requirement identified in *Ait Elhocine*. At its highest, his Memorandum of Argument submits that he testified at the hearing as to adverse conditions within the proposed IFA location, and supported that testimony with objective evidence, in relation to high crime rates, crippling unemployment, corruption, influence peddling, political and economic turmoil, and discriminatory practices against settlers by indigenous groups. He describes his testimony as related to insecurity in Abuja, collaboration and ties the Herdsmen enjoy with Islamic groups in Nigeria who are bent on taking over Abuja, and support and sympathy the President has shown to the Herdsmen. However, the objective evidence was available to the RPD and RAD and is referenced in their respective IFA analyses, and the Applicant has provided no substantive detail as to his testimony that would allow the Court to conclude that his testimony could have been determinative in those analyses.

[38] Applying the correctness standard to the procedural fairness leading to the RAD Appeal Decision, I find no reviewable error. For the same reasons, if I were to apply the correctness standard (as advocated by the Applicant) to the procedural fairness leading to the RPD Decision, I would again find no reviewable error.

[39] Applying the reasonableness standard to the RAD Appeal Decision's consideration of the procedural fairness leading to the RPD Decision (per the guidance of *Chaudry* and similar authorities cited earlier in these Reasons), the resulting attention to the reasons of the RAD in the RAD Appeal Decision again supports a conclusion that such decision demonstrates no reviewable error. The RAD relied on the explanation in *Roy* (at para 34) that an applicant must demonstrate that a breach of procedural fairness was material to the decision. I acknowledge, and agree with, the Applicant's submission that it is not only in the arena of credibility that evidence matters. However, the RAD also reasoned that the Applicant had not alleged that the RPD misconstrued his testimony or that there were other material factual errors in the RPD Decision. I find the reasoning in the RAD Appeal Decision consistent with the applicable jurisprudence explained earlier in these Reasons. Applying the principles of reasonableness review prescribed by *Vavilov*, I find this reasoning transparent and intelligible.

[40] I will turn briefly to the RAD Reopening Decision, which addresses whether the Applicant established a failure to observe the principles of natural justice. My above conclusion that the RAD Appeal Decision was reached in a procedurally fair manner is effectively dispositive of the judicial review of the RAD Reopening Decision. Certainly, if I were to apply the correctness standard to my consideration of the RAD Reopening Decision, as the Applicant advocates, the analysis would be the same.

[41] Applying the reasonableness standard per the guidance of *Rokisini* and similar authorities cited earlier in these Reasons, the resulting attention to the reasons of the RAD again supports a conclusion that the RAD Reopening Decision demonstrates no reviewable error. The RAD relied

on the explanation in *Martinez* (at para 12) that it is necessary to consider the effect the absence of a recording has on the outcome of the case and whether such absence prevents the RAD from addressing the case properly. The RAD noted that the RAD Appeal Decision addressed the absence of the recording and concluded that, as the recording would do nothing to change the outcome of the decision, its absence did not create a breach of natural justice. The RAD Reopening Decision concurred with this analysis in the RAD Appeal Decision. Again applying the principles of reasonableness review prescribed by *Vavilov*, I find this reasoning transparent and intelligible.

[42] In conclusion on this issue, I find that the Applicant's procedural fairness and natural justice arguments do not demonstrate reviewable errors in either the RAD Appeal Decision or the RAD Reopening Decision.

Is the IFA analysis in the RAD Appeal Decision reasonable?

[43] In challenging the reasonableness of the IFA decision in the RAD Appeal Decision, the Applicant first submits that the RAD erred in rejecting much of the proposed new evidence adduced by the Applicant on appeal. He argues that the relevance of the new evidence was self-evident, in that it relates to insecurity in the proposed IFA location and resulting harm he would face there.

[44] However, as the Respondent submits, the RAD rejected this evidence (other than a portion of the Applicant's brother's affidavit) on the basis that it was not new, in the sense that it was not reasonably available prior to the RPD Decision or could not have been reasonably

expected to be provided before that date. Neither the Applicant's arguments before the RAD nor his arguments before the Court satisfy those criteria. I find nothing unreasonable in the RAD's rejection of the proposed new evidence.

[45] Turning to the substantive IFA analysis itself, the Applicant challenges the reasonableness of the RAD's conclusions under both are branches of the IFA test. In relation to the first branch, considering safety in Abuja, he submits that, particularly in the context of protection under section 96 of the IRPA, the RAD failed to recognize his vulnerability as a lawyer who must carry out his trade in public and unreasonably linked his claim to the protection of his family's lands.

[46] The RAD concluded that the Applicant had not provided sufficient evidence to establish that, if he were removed from Edo state and the land dispute, the Herdsmen would have the means and motivation to pursue him. The RAD arrived at this conclusion based on the evidence before it, including the new evidence from the Applicant's brother that the RAD admitted. As the Respondent submits, the Applicant's arguments challenging the RAD's analysis under the first branch of the IFA test represent disagreements with the way the RAD evaluated and weighed the evidence, which cannot form the basis for a successful judicial review.

[47] The Applicant's arguments under the second branch of the test emphasize factors in Abuja such as crime rate, unemployment, corruption, influence peddling, political and economic turmoil, activities of religious extremists, discrimination against non-indigene settlers, as well as the fact that moving there would have upon his mental health. However, the RAD's analysis

under the second branch of the IFA test took into account mental health considerations and various security risks in Abuja, concluding that they would not make relocation unduly harsh as required by the applicable test. Again, the Applicant's submissions seek to have the Court reweigh the evidence, which is not its role.

[48] I find no basis to conclude that the IFA analysis in the RAD Appeal Decision is unreasonable.

VII. Conclusion

[49] Having considered the Applicant's arguments and finding no reviewable error in either of the decisions under review, both applications for judicial review must be dismissed. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-8299-22 AND IMM-10278-22

THIS COURT'S JUDGMENT is that these applications for judicial review are dismissed. No question is certified for appeal. A copy of this decision shall be placed on both Court files IMM-8299-22 and IMM-10278-22.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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