Federal Court Cour fédérale

Date: 20180419

Docket: IMM-4514-17

Citation: 2018 FC 419

Ottawa, Ontario, April 19, 2018

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

EKE PRESTON IFEANYI AND EKE NWAMAKA PHEOBE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants, Mr. Preston Eke and his wife, Mrs. Nwamaka Eke, are both citizens of Nigeria. They came to Canada after having spent some time in the United States. Upon their arrival, Mr. and Mrs. Eke sought refugee protection and claimed that they feared persecution in Nigeria on three main grounds. First, they said that their lives are at risk from Mr. Eke's

extended family because of his title as an Igbo tribal chief with royal blood and his wife's status as an Osu, an outcast. Second, they alleged that the Nigerian government is persecuting Mr. Eke for his political activities with the secessionist Movement for the Actualization of the Sovereign State of Biafra [MASSOB]. Third, as they are infected with the Human Immunodeficiency Virus [HIV], Mr. and Mrs. Eke claimed to fear persecution in Nigeria because they would be stigmatized and discriminated against due to their medical condition and be unable to obtain adequate lifesaving treatment.

[2] In March 2017, a panel of the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada dismissed Mr. and Mrs. Eke's refugee claim because several of their alleged grounds were not credible, they lacked a well-founded fear and they failed to provide sufficient evidence in support of their claims. The RPD thus concluded that Mr. and Mrs. Eke were neither Convention refugees nor persons in need of protection pursuant to section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. In October 2017, the Refugee Appeal Division [RAD] confirmed the RPD's findings [Decision]. In the Decision, the RAD dealt principally with Mr. and Mrs. Eke's claims of persecution in relation to their HIV-positive status and found that, while their HIV diagnostic might give rise to discrimination in Nigeria, it did not amount to a risk of persecution.

[3] Mr. and Mrs. Eke now seek judicial review of the RAD's Decision. They argue that the Decision is unreasonable since the RAD erred in its assessment of the country conditions evidence on the treatment of HIV-positive persons in Nigeria and in its consideration of Mr. and

Mrs. Eke's personal circumstances. They ask this Court to quash the Decision and to send it back for redetermination by a different panel.

[4] The only issue raised by Mr. and Mrs. Eke's application for judicial review is whether the RAD's findings are unreasonable. For the reasons that follow, I will dismiss this application for judicial review. Having considered the RAD's findings, the evidence before it and the applicable law, I can find no basis for overturning the RAD's Decision. The Decision was responsive to the evidence, and the outcome is defensible based on the facts and the law. It falls within the range of possible, acceptable outcomes. There are therefore no grounds to justify this Court's intervention.

II. Background

A. *The RAD's Decision*

[5] In its reasons, the RAD first noted that Mr. and Mrs. Eke did not raise issues relating to the RPD's finding that they would not face persecution from Nigerian authorities based on Mr. Eke's alleged activities with MASSOB nor with the RPD's conclusion that Mrs. Eke would not be at risk from Mr. Eke's extended family because she is an Osu. Further, the RAD decided that it did not need to assess whether the RPD had erred in its exclusion assessment, since the only RPD finding challenged on appeal, namely the risk based on Mr. and Mrs. Eke's HIV-positive status, was determinative.

[6] The RAD considered the documentary evidence on the treatment of people with HIV-positive status in Nigeria, particularly in regard to the societal treatment and the ability of HIV-positive people to obtain medical care and services in Nigeria. The RAD then reviewed this evidence in light of Mr. and Mrs. Eke's particular circumstances to determine whether, on a forward-looking basis, the allegations of ill-treatment amounted to persecution in their case. The RAD defined "persecution" in reference to many sources, notably in relation to the Supreme Court's description of persecution as meaning a sustained or systemic violation of basic human rights, with the emphasis on the serious and systematic nature of the discriminatory acts (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 734).

(1) Societal treatment of HIV-positive persons in Nigeria

[7] The RAD confirmed that the documentary evidence established that there is stigma and discrimination against HIV-positive people in Nigeria, especially against those who are gay or perceived to be gay. However, the RAD concluded that the documentary evidence speaks generally about discrimination, and that the documents, some being dated and general, did not provide a sufficient link to Mr. and Mrs. Eke's personal circumstances allowing it to conclude that discrimination suffered by people in a position similar to that of Mr. and Mrs. Eke could rise to the level of persecution. The RAD also observed that Nigeria was making progress in its fight against HIV, and that societal perceptions and medical treatment of HIV-positive persons were improving in the country.

[8] The RAD further noted that Mr. and Mrs. Eke had provided no evidence of anyone in Nigeria discriminating against them personally due to their HIV-positive status, despite evidence

that people in Mr. Eke's community knew of their infection during the time they resided in Nigeria in 2015. Nor did Mr. and Mrs. Eke provide sufficient credible and trustworthy evidence that they would be perceived as sexually immoral or homosexual because of their HIV-positive status, which would place them at heightened risk in Nigeria. The RAD also highlighted the fact that Mr. and Mrs. Eke's work as entrepreneurs, including their international travel, was demonstrative of their economic success and resourcefulness, which could insulate them from discrimination in employment compared to other Nigerians living with HIV. This also led the RAD to conclude that Mr. and Mrs. Eke would be able to afford necessary treatments in Nigeria should they return there (since the evidence showed that they had no difficulties in affording or accessing medications when they resided in Nigeria in 2015). The RAD concluded its discussion of social discrimination by pointing out that, not only was there no evidence that the Nigerian government was attempting to eliminate those with HIV, but the government took active steps in preventing and treating the virus despite budgetary constraints.

(2) Medical care and treatment for people with HIV-positive status in Nigeria

[9] The RAD then turned its mind to medical care and services, and determined that the acts of discrimination were not of such a persistent and repeated nature as to cause physical and psychological harm to Mr. and Mrs. Eke, or to deny them basic and fundamental human rights. The RAD judged that Mr. and Mrs. Eke would be able to live their lives in Nigeria unencumbered on a daily basis, albeit with potentially occasional discriminatory treatment. The RAD underlined that the documentary evidence also showed that medical treatment is available in urban areas but that rural ones are not as well served. Thus, the RAD found that, since Mr. and Mrs. Eke were from Lagos, they were more likely to receive access to medical care compared to

other people with HIV residing in more rural parts of Nigeria. The RAD furthermore noted the evidence that treatment was costly, but observed that the evidence was unclear about the extent of the added expenses, such as whether they are prohibitive or whether there is a disparity between urban and rural areas, or between public and private institutions. The RAD also described that improvements in the prevalence rate of HIV/AIDS demonstrates an increasing effectiveness in combating the virus epidemic in Nigeria.

[10] The RAD emphasized that Mr. and Mrs. Eke were unable to provide any credible and trustworthy evidence that they were discriminated against based on their HIV-positive status in the receipt of medical care, and had failed to identify any similarly-situated person whose experiences could assist the RAD in determining whether they would be unable to obtain access to the required treatment.

B. *The standard of review*

[11] The applicable standard of review for the issues raised in the present case has already been determined in the jurisprudence. As a result, there is no need to proceed to an analysis to identify the appropriate standard of review (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 62). For the analysis of the cumulative basis for persecution, the standard of reasonableness applies (*Koky v Canada (Citizenship and Immigration)*, 2017 FC 1035 [*Koky*] at para 11; *Galamb v Canada (Citizenship and Immigration)*, 2016 FC 1230 at para 12; *Dubat v Canada (Citizenship and Immigration)*, 2016 FC 1061 [*Dubat*] at para 35). Similarly, the RAD's assessment of the documentary evidence is reviewable on the reasonableness standard (*Deri v Canada (Citizenship and Immigration)*, 2015 FC 1042 [*Deri*] at para 26). Both parties agree.

[12] The reasonableness standard requires deference to the decision-maker as it is “grounded in the legislature’s choice to give a specialized tribunal responsibility for administering the statutory provisions, and the expertise of the tribunal in so doing” (*Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at para 33). Since the IRPA is the enabling statute that the RAD is entrusted to enforce, its interpretation and application fall within its core area of expertise. In such circumstances, a high degree of deference is owed to the RAD’s factual findings and assessment of the evidence (*Koky* at para 11).

III. <u>Analysis</u>

[13] Mr. and Mrs. Eke raise a number of concerns with the RAD’s Decision and its assessment of the evidence. In essence, they contend that the RAD erred in deciding that they would not face persecution in Nigeria by engaging in a flawed analysis of the objective conditions prevailing in Nigeria. Mr. and Mrs. Eke further argue that the RAD erred in its analysis of their personal circumstances by engaging with the issues in a superficial and artificial manner.

[14] I disagree with Mr. and Mrs. Eke’s contentions. I instead conclude that the RAD’s Decision fits well within the boundaries of reasonableness, with respect to both its assessment of the evidence and its consideration of Mr. and Mrs. Eke’s personal profiles and circumstances. Mr. and Mrs. Eke simply attempt to reargue the facts that were before the RAD, and ask the Court to weigh the evidence differently. This is not a ground for judicial review. The RAD’s Decision is well-reasoned and bears all the hallmarks of transparency, justification and intelligibility. The Court’s intervention is therefore unwarranted.

A. ***The RAD's assessment of the evidence***

[15] The RAD found that, as HIV-positive persons, Mr. and Mrs. Eke might face discrimination if they were to return to Nigeria, but that such discrimination would not rise to the level of persecution. As a preface to its analysis, the RAD acknowledged that the dividing line between persecution and discrimination or harassment is difficult to draw. However, it is for the RAD to make this factual determination, based on its expertise and on its balancing of the evidence adduced. This is the exercise that the RAD conducted in its Decision.

[16] In the present case, the RAD did not ignore the documentary evidence nor was it blind to it. Far from it. A review of the RAD's reasons reveals that the RAD did acknowledge and consider the existence of discrimination against HIV-positive people in Nigeria. It clearly referred to the stigma and discrimination suffered by HIV-positive persons in Nigeria. However, discrimination does not always equate with persecution; in some cases, it may not be serious enough to warrant being qualified as persecution. The jurisprudence shows that an acknowledgment that a person might suffer from discrimination does not necessarily mean that the person is persecuted (*Kwiatkowsky v Minister of Employment and Immigration*, [1982] 2 SCR 856 at 863; *Dubat* at para 32; *Al-Mahamud v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 521 at para 8). Such a factual finding, to which this Court has to defer, is open to the RAD to make, provided it does so in a transparent, justifiable and intelligible manner (*Rocha v Canada (Citizenship and Immigration)*, 2015 FC 1070 at paras 36-37, 42-44).

[17] In this case, the RAD accurately set out the documentary evidence, weighed it and reasonably concluded that it did not rise to the level of persecution. I am satisfied that the RAD considered all the admissible evidence in its totality. More specifically, the RAD did not ignore the content of documentary evidence reflecting negative factors, and its treatment of them was reasonable (*Deri* at para 86).

[18] Throughout their submissions, Mr. and Mrs. Eke propose alternative interpretations of the evidence before the RAD and submit that their evidence should have prevailed. The arguments they put forward simply express their disagreement with the RAD's assessment of the evidence and ask the Court to prefer their own assessment to that of the decision-maker. In fact, they invite the Court to dissect the reasons given by the RAD in order to single out possible errors or omissions, and to reweigh the evidence presented to the RAD. However, this is not the role of the Court on judicial review.

[19] Mr. and Mrs. Eke point to passages in the documentary evidence to the effect that the situation of HIV-positive people in Nigeria is less than ideal. Yet they fail to show how this evidence was ignored, or how it renders the RAD's analysis unreasonable. In fact, the RAD was very careful to underline the difficult conditions faced by HIV-positive persons in Nigeria. But, upon analyzing all the evidence before it, it concluded that Mr. and Mrs. Eke do not themselves face a reasonable risk of persecution.

[20] I find the RAD's reasoning to be transparent and intelligible. This is not a case where the RAD failed to consider the evidence provided, or some contrary country conditions evidence.

Quite the opposite. A reading of the Decision suffices to convince me that the RAD did not ignore or fail to consider the evidence submitted. The RAD reviewed the evidence in detail, and found it insufficient and unconvincing to corroborate Mr. and Mrs. Eke's assertions that they would be persecuted. At the hearing before this Court, counsel for Mr. and Mrs. Eke conceded that this is not a case where evidence was ignored or not considered by the RAD, or where the administrative tribunal overlooked some contradictory evidence when making its findings of fact. It is instead one where the reasons make it clear that the RAD carefully considered all the evidence adduced but did not find it persuasive enough to rule in favour of Mr. and Mrs. Eke.

[21] When reviewing a decision on the standard of reasonableness, the analysis is concerned "with the existence of justification, transparency and intelligibility within the decision-making process", and the administrative tribunal's findings should not be disturbed as long as the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47). In conducting a reasonableness review of factual findings, it is not the role of the Court to reweigh the evidence or the relative importance given by the decision-maker to any relevant factor (*Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 at para 99). Under a reasonableness standard, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, and the decision is supported by acceptable evidence that can be justified in fact and in law, a reviewing court should not substitute its own view of a preferable outcome, nor can it reweigh the evidence (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*] at paras 16-17).

[22] Mr. and Mrs. Eke take particular exception with the comment made by the RAD at paragraph 29 of the Decision. They claim that the RAD found the evidence to be outdated and decided not to rely on it for certain parts of its Decision, while using it to conclude that discrimination against HIV-positive persons did not amount to persecution. I do not share the narrow reading of that paragraph proposed by Mr. and Mrs. Eke. I am instead of the view that, when the reasons are read as a whole, the RAD properly observed that some evidence dating from 2013 was less relevant but that more recent evidence demonstrated improvements in the situation and treatment of HIV-positive persons in Nigeria. In fact, the impugned paragraph specifically states that the documentary evidence does not provide a sufficient link to the personal circumstances of Mr. and Mrs. Eke allowing the RAD to conclude that the discrimination experienced by persons similarly-situated to Mr. and Mrs. Eke could rise to the level of persecution.

[23] The question before the Court is not whether another outcome or interpretation might have been possible. The question is whether the conclusion reached by the RAD falls within the range of acceptable, possible outcomes. A decision is not unreasonable because the evidence could have supported another conclusion. The fact that there could be other plausible interpretations, and that one of them could support a conclusion more favourable to Mr. and Mrs. Eke, does not imply that the interpretation retained by the RAD was not reasonable. The test for reasonableness dictates that the reviewing court must start from the decision and the recognition that the administrative decision-maker has the primary responsibility to make the determination. The Court shall look at the reasons, the record and the outcome and, if there is a justifiable explanation for the outcome reached, it shall refrain from intervening.

[24] It bears repeating that, on judicial review, the issue is not whether this Court would have reached the same conclusion as the RAD nor whether the conclusion reached by it is correct (*Majlat v Canada (Citizenship and Immigration)*, 2014 FC 965 [*Majlat*] at paras 24-25). Rather, deference means that the RAD must be afforded latitude to make decisions in its specialized field of expertise when "their decisions are understandable, rational and reach one of the possible outcomes one could envisage legitimately being reached on the applicable facts and law" (*Majlat* at para 24).

[25] Reasons are to be read as a whole, in conjunction with the record (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 53; *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65 at para 3). On judicial review, a reviewing court is not to endeavour into a "line-by-line treasure hunt for error" and must instead approach the reasons and outcome of a tribunal's decision as an "organic whole" (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 138; *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54; *Newfoundland Nurses* at para 14). The Court should approach the reasons with a view to "understanding, not to puzzling over every possible inconsistency, ambiguity or infelicity of expression" (*Canada (Minister of Citizenship and Immigration) v Ragupathy*, 2006 FCA 151 at para 15). When read as a whole, I am satisfied that the RAD's Decision shows that the panel properly assessed all the evidence before it. I detect nothing unreasonable in the RAD's factual findings.

B. *Mr. and Mrs. Eke's personal circumstances*

[26] Mr. and Mrs. Eke further allege that the RAD erred in failing to reasonably consider their personal circumstances. They notably fault the RAD for not having precisely defined who the similarly-situated persons to whom the RAD was comparing them were. They also complain about the fact that, in their view, the RAD looked at their past experience in Nigeria in 2015 and omitted to conduct a forward-looking analysis. I do not agree.

[27] In its Decision, the RAD dedicated several paragraphs to the societal treatment of HIV-positive persons in Nigeria and the medical care and services available to them, and considered this evidence from various angles which reflected the particulars of Mr. and Mrs. Eke's personal profiles. The RAD considered the evidence on discrimination of HIV-positive persons under different lenses: that Mr. and Mrs. Eke were from Lagos, a major urban centre in Nigeria, that they were self-employed and fairly successful entrepreneurs, and that they were a heterosexual couple and would probably not be perceived to be gay. It concluded that the societal treatment of HIV-positive persons in Nigeria and the medical care and services available to them was better in urban areas than in rural areas, that medical treatment was more accessible for persons having a higher social status and resources to afford the medications, and that stigma and discrimination was more acute for homosexuals. No matter what the angle was, a common trend emerged: discrimination against HIV-positive persons in situations similar to Mr. and Mrs. Eke's was not as severe or systematic. In light of these factual considerations, the RAD concluded that the evidence of discrimination against HIV-positive persons in Nigeria was not sufficient to amount

to the level of persecution in the case of Mr. and Mrs. Eke, considering their particular attributes, profiles and personal circumstances.

[28] I find the RAD's reasoning on this front to be transparent and intelligible. Mr. and Mrs. Eke have not convinced me that the RAD failed to consider or misconstrued the evidence provided.

[29] Furthermore, the RAD clearly stated in its Decision that it was conducting a forward-looking analysis. The fact that it referred to the past experience of Mr. and Mrs. Eke in Nigeria does not mean that the RAD did not turn its mind to a prospective assessment. On the contrary, its reasons explicitly show that it did. In fact, the problem lied with the absence of evidence provided by Mr. and Mrs. Eke on their alleged risks of persecution. The RAD repeatedly pointed out in its Decision that Mr. and Mrs. Eke had failed to provide evidence that they were or could be discriminated against based on their HIV-positive status, despite evidence that people in the community in Nigeria knew about their status.

[30] The RAD's conclusion on the personal circumstances of Mr. and Mrs. Eke was based on the weight of the evidence before it and, once again, its conclusion is entitled to the Court's deference on judicial review.

[31] It is well-recognized that a decision-maker is presumed to have weighed and considered all the evidence presented to it unless the contrary is shown (*Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86 at para 36; *Florea v Canada (Minister of Employment and*

Immigration), [1993] FCJ No 598 (FCA) (QL) at para 1). A failure to mention a particular piece of evidence does not mean that it was ignored (*Newfoundland Nurses* at para 16), and a decision-maker is not required to refer to each and every piece of evidence supporting its conclusions. It is only when a tribunal is silent on evidence clearly pointing to an opposite conclusion that the Court may intervene and infer that the tribunal overlooked the contradictory evidence when making its finding of fact (*Ozdemir v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331 at paras 9-10; *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (QL) at paras 16-17). This is not the case here. Indeed, Mr. and Mrs. Eke did not refer to any such evidence in their submissions, written or oral.

[32] Nor are Mr. and Mrs. Eke's submissions to the effect that the RAD erroneously speculated about their risks of persecution persuasive. For example, the documentary evidence showed that medical treatment is more readily available in urban centres, of which Lagos is the biggest. The evidence also reflected general intolerance towards homosexuals. It was thus not unreasonable for the RAD to state that the fact that Mr. and Mrs. Eke are from Lagos or are a heterosexual couple with a child would likely expose them to less risk than if their personal profile was different. Speculation is not to be confused with inference. It is acceptable for a decision-maker to draw logical inferences based on clear and non-speculative evidence (*Laurentian Pilotage Authority v Corporation des pilotes du Saint-Laurent central inc*, 2015 FCA 295 at para 13). In the same vein, it is well-accepted that a decision-maker can rely on logic and common sense to make inferences from known facts. The RAD cannot engage in speculation and render conjectural conclusions. However, a reasoned inference is not speculation (*Bhatia v Canada (Citizenship and Immigration),* 2017 FC 1000 at para 38).

[33] Finally, I should point out that the burden was on Mr. and Mrs. Eke to establish a link between the country documents and their personal situation. Not all HIV-positive persons are subject to persecution or physical harm in Nigeria; Mr. and Mrs. Eke had not been personally subject to persecution when they went back to Nigeria in 2015. And they failed to establish why they would face a risk of persecution in the future. In each case, a claimant's personal evidence of persecution needs to be linked to the country condition evidence, as each matter must be considered on its own merits based on the personal and country condition documents. It was up to Mr. and Mrs. Eke to establish a risk that is personal to them and identifiable (*Debnath v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 332 at para 31). They have failed to do so here.

IV. <u>Conclusion</u>

[34] For the reasons set forth above, this application for judicial review is dismissed. Although Mr. and Mrs. Eke would have preferred a different decision, I am satisfied that the RAD considered all the evidence before it and adequately explained why it concluded that, on a balance of probabilities, the existence of discrimination against HIV-positive persons in Nigeria did not amount to a risk persecution in the case of Mr. and Mrs. Eke. On a standard of reasonableness, it suffices if the decision subject to judicial review has the required attributes of justification, transparency and intelligibility. This is the case here. Therefore, I cannot overturn the RAD's Decision and this Court should not intervene.

[35] Neither party has proposed a question of general importance for me to certify. I agree there is none.

JUDGMENT in IMM-4514-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed without costs;

2. No serious question of general importance is certified.

"Denis Gascon"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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