Federal Court  Cour fédérale

Date: 20200219

Docket: IMM-3161-19

Citation: 2020 FC 266

Ottawa, Ontario, February 19, 2020

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

OVWIGHO KINGSLEY OHWOFASA
ESEOGHENE OHWOFASA
(A.K.A. ESEOGHEME OHWOFASA)
EFEMENA MICHELLE OHWOFASA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This judicial review application, presented pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c 27 [the *Act*], involves a family from Nigeria. The principal applicant, Ovwigho Kingsley Ohwofasa is the father, while the second applicant is his wife. Efemena is their daughter.

[2] The refugee protection application was heard a first time by the Refugee Protection Division (RPD), but the Refugee Appeal Division (RAD) returned the matter for redetermination. It is the decision on redetermination, on May 28, 2018, rendered orally the same day the principal applicant and his wife were heard, that was made the subject of another appeal to the RAD. That decision was made on May 3, 2019. It is from that RAD decision that authorization was granted to seek judicial review. The only issue before the Court is whether it was reasonable for the RAD to find that the applicants have an Internal Flight Alternative (IFA) in Nigeria. Given that the issue to be dealt with is a limited one, only a brief summary of the allegation will suffice to provide context.

I. The facts

[3] The principal applicant was, for a time, a photographer in the Delta State of Nigeria. It appears that he did some photography for the All Progressives Party (APC), the party he joined in 2014 in the hope that future work would ensue.

[4] The allegation is that in April 2015, during an election held in Delta State, the principal applicant took photographs involving another party, the People's Democratic Party (PDP), participating in electoral malpractices. According to the RAD decision, the malpractices included assaults on voters and the removal of ballot boxes.

[5] As a result, claims the principal applicant, armed men came to his house, and threatened and assaulted his wife (the principal applicant was not present). The incident was reported to the police. Followed threatening phone calls from persons who presented themselves as belonging to

the Movement for the Emancipation of the Niger Delta (MEND). We are told that they are thugs associated with the PDP.

[6] It did not take long for the applicants to decide to seek refuge to Canada because they left Nigeria a few weeks later, arriving in Canada on June 16, 2015. Their refugee claim was heard the first time on November 5, 2015.

II. The RAD decision under consideration

[7] As already noted, the first RPD decision was set aside by the RAD. The second RPD decision was again appealed to the RAD; it is that decision, and nothing else, that is the subject of this judicial review application. Two issues were before the RAD: the applicants' credibility and an Internal Flight Alternative.

[8] The RAD had to contend with new evidence being offered by the applicant. Having considered rule 29 of the *Refugee Appeal Division Rules* (SOR/2012-257) and subsection 110(4) of the *Act*, some of that new evidence was not accepted and other new evidence was ruled inadmissible (RAD decision, para 29). The RAD also commented on the credibility analysis conducted by the RPD. However, this is of no moment as the RAD found that the determinative issue was the IFA.

[9] The RAD found that there exists an IFA in Lagos, the most populous city of Nigeria (a country of upwards of 200 million inhabitants): as such, the applicants are neither refugees nor persons in need of protection. Their appeal was dismissed.

[10] The test in order to conclude to the existence of an IFA is two-fold: (1) there is no serious possibility of persecution in the proposed IFA; (2) it would not be unreasonable to move there. In the view of the RAD, there is simply no serious possibility of persecution in Lagos because the agents of persecution operate in a different part of the country, the Delta State; the threats are based in the Delta State. In the words of the RAD, at paragraph 42, "the Appellants have not established that these individuals are going to seek the Appellants out or have the means to seek them out, outside of Sapele". Indeed, the original incident concerned a contested election in the Niger Delta Region. Thus, the first prong of the test is not met.

[11] Furthermore, the profile of the principal applicant is not one that could heighten the risk: he is a photographer with no prominent position within his party, the party of the majority which dominates the Senate and the House of Representatives. Lagos is a sprawling city of at least 13 million people situated hundreds of kilometers away from Sapele and the Delta Region.

[12] The RAD also considered the second prong of the test. Language issues, the discrimination against non-indigenes and the activities of the terrorist group Boko Haram were raised by the applicants and dismissed by the decision maker, basically because the analysis of the RPD was not in error. Whatever hardship there may be in moving to Lagos, it is not unreasonable for the applicants to move there.

III. Arguments and analysis

[13] The applicants' counsel submitted the day before the hearing of this case a book of authorities which contained documents about Nigeria which were not before the RPD nor the

RAD. Counsel for the respondent objected to the admissibility of new evidence. As I explained at the hearing, the role of a reviewing court on judicial review is to control the legality of the decision made by a tribunal. In *Bernard v Canada (Revenue Agency)*, 2015 FCA 263, the Federal Court of Appeal gave the full explanation for why, as a general rule, evidence that was not before the decision maker is not admissible before a reviewing court. As the Court of Appeal points out, a tribunal and a reviewing court have different roles (see also, *'Namgis First Nation v Canada (Fisheries and Oceans)*, 2019 FCA 149).

[14] There are exceptions to the rule, but this case does not fall within any of them. As a matter of fact, counsel for the applicants did not seek to justify the inclusion of the material in the book of authorities under any of the exceptions.

[15] I therefore indicated at the hearing that counsel could not rely on any of those documents unless they are found in the Certified Tribunal Record (CTR). Reference, if needed, should be made to the pages of the CTR.

[16] Contrary to what was argued by the applicants, the standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], para 16). It follows that the burden on an applicant is to show, on a balance of probabilities, that the decision is unreasonable as lacking in justification, transparency and in intelligibility. A measure of deference is owed to the decision maker (*Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34).

[17] The IFA is simply inherent in the definition of "refugee". One is a refugee from a country, not a region of a country (*Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 [*Rasaratnam*], at p. 710). As the Federal Court of Appeal put it more than 25 years ago, "(i)f claimants are able to seek safe refuge within their own country, there is no basis for finding that they are unable or unwilling to avail themselves of the protection of that country" (*Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 [*Thirunavukkarasu*], at p. 593). The foreign country comes into the equation only upon failure of national support (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689). Once advised that the Minister claims that there is an IFA, "the onus of proof rests on the claimant to show, on a balance probabilities, that there is a serious possibility of persecution throughout the country, including the area which is alleged to afford an IFA" (*Thirunavukkarasu*, p. 595).

[18] In my view, there are three important features that must be recognized when the issue of an IFA is raised. First, the burden of proof with respect to the two-prong test rests on the shoulders of the applicant for refugee status. The issue was nicely encapsulated in *Velasquez v Canada (Citizenship and Immigration)*, 2010 FC 1201, at paragraph 15:

> [15] The concept of an IFA is an inherent part of the Convention refugee definition because a claimant must be a refugee from a country, not from a particular region of a country (*Rasaratnam v Canada (Minister of Employment and Immigration*), [1992] 1 FC 706 at para 6). Once an IFA has been proposed by the Board, it must consider the viability of the IFA according to the disjunctive two part test set out in *Rasaratnam*. The claimant bears the onus and must demonstrate that the IFA does not exist or is unreasonable in the circumstances. <u>That is, the claimant must persuade the Board on a balance of probabilities either that there is a serious possibility that he or she will be persecuted in the location proposed by the Board as an IFA, or that it would be</u>

> unreasonable to seek refugee in the proposed IFA given his or her particular circumstances.
>
> [My emphasis.]

[19] Second, the test is well known, but it bears repeating. It was enunciated first in *Rasaratnam* (*supra*):

> In my opinion, in finding the IFA, the Board was required to be satisfied, on a balance of probabilities, that there was no serious possibility of the appellant being persecuted in Colombo and that, in all the circumstances including circumstances particular to him, conditions in Colombo were such that it would not be unreasonable for the appellant to seek refuge there.
>
> (p. 711)

[20] Third, and perhaps most importantly, the second prong of the test is meant to have a very high threshold. In *Thirunavukkarasu* (*supra*), the Court of Appeal elaborated quite significantly on the constituting elements of the test. If there was any doubt on the requirements, they were strongly and unequivocally asserted again in *Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164 [*Ranganathan*], another decision of the Federal Court of Appeal.

[21] In *Ranganathan*, the Court refers to various passages of *Thirunavukkarasu*. After having insisted that applicants are expected to avail themselves of safe havens in their own countries, the *Ranganathan* Court reproduces whole paragraphs taken from pages 597 to 599 of *Thirunavukkarasu*, but with part of the paragraphs being underlined for emphasis. I reproduce the same passages as found at paragraph 13 of *Ranganathan*:

> [13] Let me elaborate. It is not a question of whether in normal times the refugee claimant would, on balance, choose to move to a

> different, safer part of the country after balancing the pros and cons of such a move to see if it is reasonable. Nor is it a matter of whether the other, safer part of the country is more or less appealing to the claimant than a new country. Rather, the question is whether, given the persecution in the claimant's part of the country, it is objectively reasonable to expect him or her to seek safety in a different part of that country before seeking a haven in Canada or elsewhere…
>
> An IFA cannot be speculative or theoretical only; it must be a realistic, attainable option. Essentially, this means that the alternative place of safety must be realistically accessible to the claimant. Any barriers to getting there should be reasonably surmountable. The claimant cannot be required to encounter great physical danger or to undergo undue hardship in travelling there or in staying there. For example, claimants should not be required to cross battle lines where fighting is going on at great risk to their lives in order to reach a place of safety. Similarly, claimants should not be compelled to hide out in an isolated region of their country, like a cave in the mountains, or in a desert or a jungle, if those are the only areas of internal safety available. But neither is it enough for refugee claimants to say that they do not like the weather in a safe area, or that they have no friends or relatives there, or that they may not be able to find suitable work there. If it is objectively reasonable in these latter cases to live in these places, without fear of persecution, then IFA exists and the claimant is not a refugee.
>
> In conclusion, it is not a matter of a claimant's convenience or the attractiveness of the IFA, but whether one should be expected to make do in that location before travelling half-way around the world to seek a safe haven, in another country. Thus, the objective standard of reasonableness which I have suggested for an IFA is the one that best conforms to the definition of Convention refugee. That definition requires claimants to be unable or unwilling by reason of fear of persecution to claim the protection of their home country in any part of that country. The prerequisites of that definition can only be met if it is not reasonable for the claimant to seek and obtain safety from persecution elsewhere in the country. [Emphasis added.]

[22] That takes the *Ranganathan* Court to accept that the absence of relatives in the safe area may be taken into account as one factor, but more should be needed to make the IFA inadequate. As the Court puts it, “there is always some hardship, even undue hardship, involved when a

person has to abandon the comfort of his home to live in a different part of his country where he has to seek employment and start a new life away from relatives and friends. This is not, however, the kind of undue hardship that this Court was considering in *Thirunavukkarasu*" (para 14).

[23] One may ask, what kind of hardship would qualify for an IFA to be inappropriate, indeed unreasonable. *Thirunavukkarasu* spoke of crossing battle lines, hiding out in isolated regions, like a cave in the mountains or in the desert or the jungle: there cannot be a requirement of encountering great danger or to undergo hardship in staying there. That made the *Ranganathan* Court speaks in terms of life or safety being jeopardized as being where the bar is to be situated:

> [15] We read the decision of Linden J.A. for this Court as setting up a very high threshold for the unreasonableness test. It requires nothing less than the existence of conditions which 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. The absence of relatives in a safe place, whether taken alone or in conjunction with other factors, can only amount to such condition if it meets that threshold, that is to say if it establishes that, as a result, a claimant's life or safety would be jeopardized. This is in sharp contrast with undue resulting from loss of employment, loss of status, reduction in quality of life, loss of aspirations, loss of beloved ones and frustration of one's wishes and expectations.
>
> [My emphasis.]

As the Court of Appeal says, the mere fact that conditions in Canada are better, whether that be physically, economically or emotionally, is not the standard: the threshold is higher and must remain high because the line between refugee claims and humanitarian and compassionate applications must not be blurred.

[24] These authorities are binding on this Court. It follows that the considerations the applicants would want to raise in this case do not meet the threshold required by our law.

[25] The applicants contend that they will face threats in Lagos from members of an opposition party. It is their burden to show that there is a serious possibility of persecution in the proposed IFA. They also bear the heavy burden of showing that it would not be reasonable to have to move into an area of the country that would provide an IFA. Unfortunately, the applicants fail on both prongs.

[26] On the first prong, the applicants suggest that as a political photographer, the principal applicant could be identified in Lagos, a city many hundreds of kilometers from the Delta Region. There is nothing to support that contention: he took some photographs in a regional election hundreds of kilometers away. There is no indication that he had any kind of prominence that could give rise to only serious possibility he could be sought. Indeed the contention assumes that he must go back to being a photographer, a job he certainly did not occupy in Canada: this is simply not so. The applicant may consider other employment, as he did when he came to Canada. The RAD did not fail to consider the employment the principal applicant now claims he would like to pursue as part of the flight alternative. There was no explanation why the principal applicant would pursue photography as employment. Moreover, the applicants raise the specter of the use by the agent of persecution of social media to find where they are now located in Nigeria: this is no more than speculative, at best, far from a serious possibility. Given the standard of reasonableness, the applicants have not shown that the reasons are not based on an internally coherent chain of reasoning and not justified in light of the relevant legal and factual

constraints (*Canada Post Corp. v Canadian Union of Postal Workers*, 2019 SCC 67, at para 2). That the RAD did not accept the applicants' argument was perfectly reasonable and it gave reasons that satisfy the test of reasonableness: the applicants did not discharge their burden.

[27] The same is true of the second prong. The applicants complain that the RAD accepted the RPD's reasoning. I can see nothing wrong in being satisfied, on a standard of correctness that applies to the RAD decision, that the RPD was correct, the RAD having conducted its own review.

[28] Having recognized the high standard, with its focus on not having to encounter great physical danger or to undergo undue hardship in travelling to the site of the IFA, or in staying there (applicants' memorandum of fact and law, para 24, where the applicants cite from *Thirunavukkarasu*), the applicants refer to employment opportunities in Lagos being "an uphill task" (para 26). The applicants do not account for the decision in *Ranganathan* (*supra*). Paragraph 15 of that decision sets the bar high, at "nothing less than the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to a safe area"; the Court goes on to state that "(t)his is in sharp contrast with undue hardship resulting from loss of employment, loss of status, reduction in quality of life, loss of aspirations, loss of beloved ones and frustration of one's wishes and expectations" (*Ranganathan*, para 15). The applicants also raise the difficulty of maintaining accommodation in Lagos where rental costs are said to be steep. Again, the issue is not whether Lagos is more or less appealing. Obviously, many millions of Nigerians live in Lagos: the applicants have not generated actual and concrete evidence, as required, of conditions that make the IFA unreasonable. Convenience

and attractiveness of the IFA are not sufficient to reach the threshold set by our Court of Appeal. The applicants have failed to show that the RAD decision is unreasonable in view of the threshold.

[29] The applicants relied mainly on two decisions: *Okonkwo v Canada (Citizenship and Immigration)*, 2019 FC 1330 and *Ambrose-Esede v Canada (Citizenship and Immigration)*, 2018 FC 1241, both cases considering the situation of female applicants for whom IFAs had been identified in Nigeria. In both cases, the decisions were set aside by our Court.

[30] I inquired of Crown counsel whether he argued that these recent decisions had been wrongly decided. Counsel argued that there was no need to go that far, as the facts in these two cases were completely different from those in the case at bar. I agree. The facts in those two cases, as in *Okoloise v Canada (Citizenship and Immigration)*, 2018 FC 1008, are so different that they cannot be used as precedents in this case. Nevertheless, I note that none of these cases refer, contrary to *Adebayo v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 330, to *Ranganathan* (*supra*) where the Federal Court of Appeal insists on the high threshold established by that Court in earlier decisions. The threshold has been consistent and it has not been established *per incuriam*. This Court is bound by it.

[31] Finally, the applicants suggest that the RAD "heavily relied on the jurisprudential guideline (JG) on IFA" (Memorandum of fact and law, para 32), which they then proceed to distinguish from the case at hand. Two observations are worth making. First, there is no heavy reliance, in my view, on the Jurisprudential Guide. It merely comes in support of the conclusions

already made. Second, it is referred to in the context of a fear of non-state actors in Nigeria where the RAD readily acknowledges in its decision that only some facts are similar. Arguably, the facts in the JG are more sympathetic than those in the case at hand, yet the result was that there was found in those circumstances an IFA. As the RAD puts it at paragraph 54, "(t)he JG addresses a range of concerns such as employment, education, travel, accommodation and indigeneship. I adopt the reasoning of the JG in my analysis and find that while there may be hardships in Lagos [the applicants contend that the two major differences between the case at hand and the JG are that they involve a single lady, and no children, and that, in the JG, the issues were forced marriage and female genital mutilation, such that those differences would make the JG inapplicable], it is not unreasonable for the Appellants to move to Lagos". It is not unreasonable, in my estimation, for issues like employment, accommodation or indigeneship, where findings are made, to be portable to some extent from other cases, even where the facts are not exactly the same. The JG is no more than a tool created by the Chairperson of the Immigration and Refugee Board, pursuant to paragraph 159(1)(h) of the *Act*, to assist members in carrying out their duties. It is not the be all and end all. What is important is that, at the end of the day, the standard established by the Court of Appeal be the one that is applied by lower jurisdictions. The facts must be sufficiently similar to assist in the comparison between two sets of varying circumstances. No two cases are exactly identical. But there may be some decisions of the Board that may be of assistance to other Board members *(Canadian Association of Refugee Lawyers v Canada (Citizenship and Immigration),* 2019 FC 1126, para 4).

[32] There was no undue reliance on the JG. In fact, arguably, there was no reliance, only comfort found in other like cases.

[33] The RAD decision is reasonable as being justified, transparent and intelligible.

[34] The parties were in agreement that there is not question to be certified, pursuant to section 74 of the *Act*. The Court concurs.

JUDGMENT in IMM-3161-19

THIS COURT'S JUDGMENT is that:

1. The judicial review application is dismissed.

2. There is no serious question of general importance that ought to be certified.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3161-19
STYLE OF CAUSE:	OVWIGHO KINGSLEY OHWOFASA ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 30, 2019
JUDGMENT AND REASONS:	ROY J.
DATED:	FEBRUARY 19, 2020

APPEARANCES:

Oluwakemi Oduwole	FOR THE APPLICANTS
Daniel Engel	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Topmarke Attorneys Barristers & Solicitors North York, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT