Federal Court  Cour fédérale

Date: 20200603

Docket: IMM-5160-19

Citation: 2020 FC 666

Ottawa, Ontario, June 3, 2020

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

EHIME ANTHONIA AKINYEMI-OGUNTUNDE
KASOPE VINCENT AKINYEMI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This case concerns the decision of the Refugee Appeal Division ("RAD") to dismiss an appeal of a decision of the Refugee Protection Division ("RPD"), which rejected the Applicants' refugee claim on the basis that the Applicants did not establish a well-founded fear of persecution. The Applicants, a mother and minor son who are both citizens of Nigeria, had advanced a refugee claim on the ground that as a widow, the Principal Applicant would suffer

persecution from her deceased husband's family, who seeks to forcibly take custody of the Minor Applicant.

[2] On November 15, 2018, the RPD refused the Applicants' claim because there was insufficient evidence to show an objective basis to the allegation that the deceased husband's family would be able to take the Minor Applicant away from the Principal Applicant. The RPD decision was appealed to the RAD. By decision dated July 26, 2019, the RAD dismissed the appeal.

[3] On this application for judicial review, the Applicants submit that the RAD erred in its finding that the RPD did not breach its duty of procedural fairness; that the RAD erred by failing to apply the Gender Guidelines; that the RAD erred in its determination that there was inadequate evidence to support the objective basis of the claim; and that the RAD erred in its finding of Abuja as a viable IFA.

[4] For the reasons that follow, the RAD decision is reasonable. Therefore, this application for judicial review is dismissed.

II. **Facts**

A. *The Applicants*

[5] Ms. Ehime Anthonia Akinyemi-Oguntunde (the "Principal Applicant") and her son, Kasope Vincent Akinyemi (the "Minor Applicant") (collectively, the "Applicants") are citizens

of Nigeria. They are respectively 40 and 14 years old. The Principal Applicant was married to Mr. Idowu Akinyemi-Oguntunde, but was widowed when Mr. Akinyemi-Oguntunde passed away on January 31, 2007. In late 2015, two members of Mr. Akinyemi-Oguntunde's family came to the Principal Applicant's home and told her that they would be taking custody of the Minor Applicant as per Yoruba cultural traditions. The Principal Applicant claims that in Yoruba tradition, if a married man passes away, his family takes custody of the children from the marriage, regardless of the wishes of the widowed mother of the children.

[6] The Principal Applicant requested time to discuss the matter with her family, who unsuccessfully attempted to convince Mr. Akinyemi-Oguntunde's family to leave the Minor Applicant with his mother. Mr. Akinyemi-Oguntunde's family continued to demand custody of the Minor Applicant. In July 2016, three members of Mr. Akinyemi-Oguntunde's family came to the Principal Applicant's home, and forced their way in. The Principal Applicant had asked a friend to take the Minor Applicant for safekeeping before the family members barged into their home. The family members only left when they knew that the Minor Applicant would not be returning home that day, and told the Principal Applicant that they would eventually take away the Minor Applicant and prevent her from ever seeing her child.

[7] After this incident, the Principal Applicant decided to leave Nigeria. The Principal Applicant alleges that she contemplated moving to a different part of Nigeria, but determined that Mr. Akinyemi-Oguntunde's family members could find her anywhere in the country. On August 26, 2016, the Applicants left for the U.S., but did not make an asylum claim there due to

the hostile climate against refugees. On December 14, 2017, the Applicants travelled by bus to Quebec, and submitted a refugee claim.

[8] By decision dated November 15, 2018, the RPD rejected the Applicants' refugee claim. The RPD decision was appealed to the RAD, and by decision dated July 26, 2019, the RAD dismissed the appeal.

B. *The RAD Decision*

[9] The RAD found that the determinative issues were: 1) whether there was a breach of procedural fairness by the RPD by inadequately stating that the objective basis for the well-founded fear was a live issue, and 2) whether the RPD erred in its finding that there was insufficient evidence to show an objective basis for the well-founded fear of persecution. The RAD noted that it conducted an independent analysis of the evidence concerned, including a review of the RPD hearing, the RPD decision, and the Principal Applicant's Basis of Claim ("BOC") form, while bearing in mind the *Chairperson's Guidelines on Child Refugee Claimants* (the "*Child Guidelines*"), and *the Chairperson's Guidelines* on *Gender Based Violence* (the "*Gender Guidelines*").

[10] The RAD noted that one of the RPD's main reasons for refusing the claim was the insufficient evidence to show an objective basis for the Principal Applicant's allegation that the husband's family would be able to take the Minor Applicant away from her. On this issue, the RAD acknowledged that the RPD did not explicitly outline the issue concerning an "objective basis", but also noted that the Applicants' counsel nonetheless provided "fulsome submissions

on the issue of objective basis, including reference to Item 5.5 of the Nigeria National Documentation Package on the position of divorcees against their husbands being similar to those of widows". The RAD found that the Applicants could not argue that they did not know objective basis was not an issue. The RAD found that it could not see how the Applicants would have changed their strategy at the RPD hearing even if the RPD had explicitly outlined objective basis as a live issue, and the RAD thus concluded that there was no breach of procedural fairness by the RPD.

[11] On the issue of insufficient evidence, the RAD rejected the Applicants' submission that divorcees and their disadvantaged circumstances against the husband's family was analogous to the situation of a widow. The RAD found that a crucial difference between the situation of a divorcee and a widow is the physical presence of the husband, and noted that the documentary evidence showed—in the case of a divorce—the ex-husbands play a crucial role in taking efforts to obtain custody of the children. The RAD found that the absence of the husband removes an integral element to his family's control over the widowed individual, and that there was a lack of documentary evidence to support the Applicants' submissions. The RAD concluded that the RPD did not err in its analysis of the evidence, and that there was insufficient objective basis to the Applicants' well-founded fear of persecution.

[12] On the issue of the IFA, the Applicants had referenced a document in the National Documentation Package ("NDP"), which stated that widows are placed under confinement, forced to shave their heads, and wear black for one year in northern Nigeria. The RAD pointed out that Abuja is in central Nigeria, and that these practices were not mentioned as something

feared by the Principal Applicant. The RAD noted that the Violence Against Persons Prohibition of 2015 ("*VAPP Act*") prohibits harmful traditional practices—which includes behaviour, attitudes, or practices that negatively affect the fundamental rights of women, and includes harmful widowhood practices—and is applicable to the Federal Capital Territory ("FCT"). Abuja is a city in the FCT. The RAD found that the *VAPP Act* provisions could provide protection for the Applicants in the event that Mr. Akinyemi-Oguntunde's family attempt to take the Minor Applicant. The RAD concluded that Abuja constitutes a safe IFA.

[13] Noting the Immigration and Refugee Board's ("IRB") policy on the use of Jurisprudential Guides, the RAD found that the Nigeria Jurisprudential Guide had sufficient similar facts to the case at bar, and that it should be followed. The RAD found that while the employment and accommodation situations may be difficult in Abuja, the Applicants had to provide evidence that their individual situations would result in undue hardship. Given the Principal Applicant's post-secondary education and "meaningful work experience", the RAD found that the Applicants would not suffer undue hardship from economic and accommodation circumstances, if they were to relocate to Abuja. The RAD also noted that the Applicants speak English, which is sufficient to overcome any deficiencies in the local languages, according to the Nigeria Jurisprudential Guide. Although the Principal Applicant argued that she would be unable to send her son to school due to an inability to pay school fees, the RAD found that the law requires "tuition-free, compulsory, and universal basic education for every child of primary and junior secondary school age". The RAD concluded that Abuja constitutes a reasonable IFA.

III. **Issues and Standard of Review**

[14] The following issues arise in this application for judicial review:

A. Did the RAD err in finding that the RPD did not breach its duty of procedural fairness by failing to inform the Applicants of the "objective basis" as a live issue?

B. Did the RAD err by making veiled credibility findings and err in its decision not to hold an oral hearing?

C. Did the RAD err in failing to apply the *Gender Guidelines* and the *Child Guidelines*?

D. Did the RAD err by determining that there was inadequate evidence to support the objective basis for the Applicants' claim?

E. Did the RAD err in its IFA analysis?

[15] Prior to the recent decision of the Supreme Court in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII) [*Vavilov*], this Court had consistently held that the standard of review applicable in reviewing a RAD decision is that of reasonableness (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 (CanLII) at para 74; *Verma v Canada (Citizenship and Immigration)*, 2016 FC 404 (CanLII) at para 14). Reasonableness also extends to the review of a decision not to hold an oral hearing, as it involves the RAD's interpretation of

its own statute: *Balde v Canada (Citizenship and Immigration)*, 2015 FC 624 (CanLII) at para 21.

[16] As noted by the majority in *Vavilov*, "a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker," (*Vavilov* at para 85). Furthermore, "the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency," (*Vavilov* at para 100).

[17] The question of procedural fairness is reviewable on a correctness standard (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Yankson v Canada (Citizenship and Immigration)*, 2019 FC 1608 (CanLII) at para 14).

IV. **Analysis**

A. *Did the RAD err in finding that the RPD did not breach its duty of procedural fairness by failing to inform the Applicants of the "objective basis" as a live issue?*

[18] The Applicants submit that the RAD erred in finding that the RPD did not breach its duty of procedural fairness, as the RPD had failed to notify the Applicants of the issue that formed the central basis for the claim. The Applicants submit that the RAD erred in making this determination based on speculation as to what the Applicants' counsel could or would have done

differently. The Applicants argue that the RPD did not inform the Applicants that their claim was being considered on the "plight of widows in Nigeria" and the custody rights of widows.

[19] The Respondent submits that the RAD properly concluded there was no evidence to suggest how the Applicants would have changed their strategy had the RPD explicitly outlined objective basis as a live issue. The Respondent submits there was no breach of procedural fairness. The Respondent adds that on application for judicial review, the Applicants have not adduced anything to undermine the RAD's finding, and submits that the Applicants' argument does not indicate any prejudice to them.

[20] In my view, the RAD did not err in finding that the RPD did not breach its duty of procedural fairness. In the refugee claim, the Principal Applicant alleged a fear of persecution against the family of her late husband who wished to take custody of the Minor Applicant, which concerns a fear of persecution against widows and their custody rights in Nigeria. Although the Applicants argue that they were not informed that the "objective basis" would be a live issue, it is difficult to accept that the Applicants' counsel would not have anticipated that both subjective and objective elements and supporting evidence may be assessed in a refugee claim determination, since both are crucial elements to establishing well-founded fear in a refugee case (*Canada (Attorney General) v Ward*, 1993 CanLII 105 (SCC), [1993] 2 SCR 689). The RAD did not err with respect to this issue.

B. *Did the RAD err by making veiled credibility findings and err in its decision not to hold an oral hearing?*

[21] The Applicants submit that the RAD breached procedural fairness by not holding an oral hearing because the RAD's findings on the insufficiency of evidence were veiled credibility findings. The Applicants submit that the RAD disbelieved the Applicants' assertions, and would have believed them if the Applicants had presented objective evidence corroborating their assertions. The Applicants take the position that the RAD failed to make a determination on the evidence before it, and erred by highlighting the lack of specific evidence that was not submitted. The Applicants submit that the distinction between widows and divorcees bears little significance in light of the fact that women are persecuted in Nigeria when they attempt to enforce their custody rights.

[22] The Respondent submits that no oral hearing is to be held before the RAD unless all three criteria under sections 110(6) and 110(4) of the *IRPA* are met. However, the Respondent submits that as the case at bar concerned the sufficiency of evidence and not credibility, the conditions of s. 110(6) of the *IRPA* were not met, and no oral hearing was required (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 (CanLII), [2016] 4 FCR 230 at para 51).

[23] As noted above, the RAD's decision not to hold an oral hearing is reviewed on a reasonableness standard. In any case, I find that the RAD did not engage in a veiled credibility finding, and that the RAD did not err by not holding an oral hearing. I agree with the Respondent that the issue was of the sufficiency of evidence, and not of credibility.

C. *Did the RAD err in failing to apply the Gender Guidelines and the Child Guidelines?*

[24] The Applicants submit that both the RPD and the RAD erred by failing to apply the *Gender Guidelines* and the *Child Guidelines*. The Applicants submit that the RPD referenced the *Gender Guidelines*, but failed to adequately apply them to the decision. The Applicants rely on *Yoon v Canada (Citizenship and Immigration)*, 2010 FC 1017 (CanLII) at para 5, where this Court found, "It is not sufficient to withstand a judicial review for the RPD to simply say that the Gender Guidelines were applied but fail to demonstrate that they were applied."

[25] The Applicants also rely on *Tumisang v Canada (Citizenship and Immigration)*, 2012 FC 589 (CanLII) at paragraph 5 for the proposition that the evidence of a lack of state protection is often difficult to prove in cases of gender-based violence, and the RPD's failure to adequately apply the *Gender Guidelines* principles is unreasonable. As such, the Applicants submit that the RAD erred in disregarding the RPD's failure to adequately consider the *Gender Guidelines*.

[26] The Respondent submits that the Applicants' argument is without merit because the *Gender Guidelines* cannot cure the deficiencies in the Applicants' claim, i.e. insufficiency of evidence. The Respondent also submits that the Applicants have not specified how the RAD's finding and its weighing of the new evidence is incompatible with the *Gender Guidelines*.

[27] During the hearing, the Applicants' counsel drew an analogy to cases of domestic violence, to the point that such cases do not necessarily occur out in the open. I agree with the counsel's argument that "an absence of evidence is not evidence of absence", but in this

particular case, there is nothing on the record to suggest that any concerns around the application of the *Gender Guidelines* were raised and canvassed at the RAD appeal.

[28] In my view, the RAD did not err by failing to apply the *Gender Guidelines*. The aspects of the *Gender Guidelines* that the Applicants rely on pertains to the consideration that there may be a lack of evidence when the decision-maker is determining whether the state is willing or able to provide protection to a woman fearing gender-related persecution. In the case at bar, that does not appear to be the issue concerning the RAD. Rather, the RAD's concern rested with the "insufficient evidence to show an objective basis to the fear of the Husband's family," (emphasis added), even before reaching the analysis on the availability of state protection.

D. *Did the RAD err by determining that there was inadequate evidence to support the objective basis for the Applicants' claim?*

[29] The Applicants submit that the RAD erred in its determination that the objective basis for the Applicants' fear was unfounded. The Applicants submit that the RAD provided no explanation for its determination that the Principal Applicant's in-laws lacked the power and control to take the Minor Applicant away. The Applicants submit that the RAD erred in speculating that the death of the husband removed a critical element of control and power, as there was no evidence to suggest that the in-laws cannot maintain power and control notwithstanding the death of Mr. Akinyemi-Oguntunde.

[30] The Applicants submit that the RAD failed to consider the treatment of similarly situated persons, as per *Salibian v Canada (Minister of Employment and Immigration)*, 1990 CanLII

7978 (FCA), [1990] 3 FC 250 at para 18, where the Court noted, “the best evidence that an individual faces a serious chance of persecution is usually the treatment afforded similarly situated persons in the country of origin.” Moreover, the Applicants argues that the RAD erred by dismissing the Levirate Marriage article for lack of reliability, after having accepted it as being relevant and credible. The Levirate Marriage article had indicated, “widows in Nigeria are at risk of losing custody of their children, especially if the children are male. Under Nigerian customary law, children are generally considered to belong to the man’s family”.

[31] The Respondent takes the position that the Applicants’ argument fails to show how the RAD’s findings on divorcees and widows is “perverse, capricious, or without regard to the evidence.” The Respondent argues that the RAD clearly outlined the problem with attempting to equate the situation of divorcees to that of widows concerning the custody of children. The RAD had noted that the fathers play a crucial role in pursuing custody of their children in the divorce context, and that there was a lack of documentary evidence to show that the family of a deceased husband held power and control over the children’s custody.

[32] Furthermore, the reliability of the new evidence adduced by the Applicants was limited as the document was from thirteen years ago, and it had been previously removed from the NDP. The Respondent submits that an argument about the probative value of the NDP document is an argument as to weight, which is not a proper ground for judicial review.

[33] I agree with the Respondent’s position. Although the new evidence was admitted for consideration, the RAD reasonably placed a low probative value or weight on the NDP article,

which the RAD was entitled to do. Given that the document was from a source dating back to 2006, it was not unreasonable for the RAD to conclude that it should be given little weight.

[34] Moreover, the RAD reasonably found that there was insufficient documentary evidence to conclude that the family of the widow's deceased husband would be able to yield power and take the children away by force. Especially given that the Applicants claimed the persecution arose out of the Yoruba traditional practices and that this practice of taking children away from widows was "widespread" and "country-wide", the onus was on the Applicants to provide sufficient evidence to support the claim, and not for the RAD to disprove that the Principal Applicant's in-laws lacked the power to take the Minor Applicant away. Based on the evidence, the RAD explained that in the case of divorcees, the fathers played a key role in taking custody of the children. However, in the case of widows, there was little objective evidence to support the Applicant's claim. Therefore, I find that the RAD decision is reasonable.

E. *Did the RAD err in its IFA analysis?*

[35] The Applicants submit that the RAD erred in its IFA analysis. The Applicants submit that the RAD's emphasis on the *VAPP Act* set an "improper and ill-guided foundation for the entire IFA analysis" and that the RAD failed to provide reasons supporting its determination that the *VAPP Act* was being enforced in Abuja. The Applicants argue that the RAD erred by failing to address the ability of the agents of persecution to locate the Applicants in the IFA, as the RAD did not discuss the likelihood of Mr. Akinyemi-Oguntunde's family locating the Principal Applicant in Abuja.

[36] The Respondent notes that the IFA test has two prongs: first, the decision-maker must be satisfied, on a balance of probabilities, that there is no serious possibility of the claimant being persecuted in the proposed IFA; and second, the conditions in the proposed IFA must be such that it would not be unreasonable, upon consideration of the circumstances, for the claimant to seek refuge there (*Ehondor v Canada (Citizenship and Immigration)*, 2017 FC 1143 (CanLII) at para 11). The Respondent submits that the RAD reasonably noted the *VAPP Act*, which prohibits harmful traditional practices, including harmful widowhood practices. Since the *VAPP Act* applies to Abuja, the Respondent argues that the RAD reasonably found that there was no serious possibility of persecution in the IFA. Moreover, the Respondent submits that the Applicants bear the onus to provide evidence, not for the RAD to disprove the Applicants' claim.

[37] In my view, the RAD did not err by failing to address the ability of the agents of persecution to locate the Applicants in the IFA. In fact, the Applicants did not make submissions on whether Mr. Akinyemi-Oguntunde's family had the ability or willingness to locate the Principal Applicant in Abuja, but only on the general difficulties that the Applicants would face in Abuja. I note that the onus of proof rested on the Applicants to show that there would be a serious possibility of persecution in Abuja from the agents of persecution. As for the second prong of the IFA test, it was reasonable for the RAD to conclude that it would not be unreasonable for the Applicants to seek refuge in Abuja. The Principal Applicant holds a Higher National Diploma, and has worked a number of different jobs between 2006 and 2016, which would place the Principal Applicant in a more favourable position to secure employment. Moreover, the Applicants speak English, which would help to overcome the inability to speak other local languages. As for the tuition fees of the Minor Applicant, the RAD found that the

Nigerian law requires “tuition-free, compulsory, and universal basic education for every child of primary and junior secondary school age”. Therefore, the RAD did not err by concluding that Abuja would constitute a reasonable IFA for the Applicants.

V. **Conclusion**

[38] For the foregoing reasons, I find the RAD decision is reasonable. This application for judicial review is dismissed.

[39] No questions for certification were raised, and I agree that none arise.

JUDGMENT IN IMM-5160-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. No question is certified.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5160-19
STYLE OF CAUSE:	EHIME ANTHONIA AKINYEMI-OGUNTUNDE AND KASOPE VINCENT AKINYEMI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY TELECONFERENCE BETWEEN OTTAWA AND TORONTO, ONTARIO
DATE OF HEARING:	MAY 25, 2020
JUDGMENT AND REASONS:	AHMED J.
DATED:	JUNE 3, 2020

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