Federal Court  Cour fédérale

Date: 20210608

Docket: IMM-1764-20

Citation: 2021 FC 556

Ottawa, Ontario, June 8, 2021

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

SUNDAY OLUWAFEMI AJAGUNA
IDAYAT FOLAKE SAKA
FIFEHANMIR REX OLUWAFEMI
(A.K.A FIFEHANMI REX OLUWAFEMI)
OLUWADARASIMI ETHAN OLUWAFEMI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This application is brought by Sunday Ajaguna [Principal Applicant] seeking to set aside a decision of the Refugee Appeal Division [RAD] denying the Applicants' appeal from a dismissal of their claims to refugee protection by the Refugee Protection Division [RPD].

[2] The Applicants are a Nigerian family claiming to be at risk from a former business partner of the Principal Applicant. The RPD dismissed their claims to protection finding that the risk allegations were not credible and because viable internal flight alternatives [IFAs] were available. The RAD upheld the RPD decision largely for the same reasons. It accepted into evidence affidavits from third parties alleging that the agent of persecution was continuing to pursue and threaten the Principal Applicant but ultimately it found that evidence to be unreliable.

[3] It is the treatment of this new evidence by the RAD that is at the heart of this application. The Applicants also raise concerns about the RAD's refusal to accept their request for an oral hearing and about its finding that viable IFAs were available in Nigeria.

I. Did the RAD Err in its Treatment of the New Evidence?

[4] The Applicants argue that the RAD's decision is internally inconsistent insofar as it dealt with the new evidence from the Principal Applicant's mother-in-law and from several family friends. They contend that, on the one hand, the RAD admitted the evidence for purposes of s 110 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] but later found the evidence to be unreliable. This is said to run afoul of the holding in *Yurtsever v Canada (Minister of Citizenship and Immigration)*, 2020 FC 312 at para 16, [2020] FCJ No 296, where a similar approach to new evidence was found to be a reviewable error. This is an issue to be assessed on the standard of reasonableness.

[5] What the RAD did in this instance was to make a determination about whether the new evidence was *prima facie* admissible, leaving the final determination of its probative value to the

evidentiary stage of the adjudicative process. This is evident from its statement at paragraph 8 of its reasons where it accepts the evidence for "admissibility purposes".

[6] There is nothing inherently illogical or inconsistent when a decision-maker admits new evidence because of its potential to affect the outcome of a case but ultimately finds it to be unreliable when examined closely against other received evidence. Even if the RAD had rejected the new evidence at the preliminary admissibility stage, the outcome of the case would not have changed. The new evidence would simply have been rejected at an earlier point. In other words, it was inevitable that the RAD would find that the new evidence was too unreliable to be believed. The Applicants' arguments on this issue effectively elevate form over substance and I do not accept them.

[7] The RAD also had a strong basis for rejecting this evidence as can be seen from the following extract from its reasons:

> I have some credibility concerns with this evidence, not least of which is the extraordinary coincidence that agents of persecution suddenly appear in every single proposed IFA, in the short period of time surrounding the perfection of this appeal.
>
> [32] The affiants Ogar, Kehinde, Inibu, Martins, Abiodum and mother-in-law Alaba all say they told the visitors that the PA was in Qatar, even though the PA had left Qatar and been in Canada since late October of 2017, over a year earlier. Mother-in-law Alaba was with the Appellants in mid-October of 2017 when they made their plans to leave Nigeria, but on December 7, 2018 she tells the inquiring visitor that the PA was in Qatar. I have considered the possibility that all five affiants had the presence of mind to lie about the Appellants' whereabouts in order to protect them, except that the truth that they were in Canada could have achieved the same result of protecting them. I find it not credible that four old friends and his own mother-in-law did not know that the PA and family were in Canada for over a year, when describing his location in late 2018.

[33] None of affiants say that the visitors uttered threats to them or to the Appellants, only that they were looking for them. Nevertheless, many of the affiants repeat allegations of attacks and attempted murder provided to them by the PA; Kehinde makes a reference to hired assassins; Inibu refers to the Appellants' relocation abroad "…due to an assassination attempt…" on the Appellants; Eunice talks about the "attempted murder of himself and his family while he was in Nigeria October, 2017."; Martins describes an attack targeted at the PA before he fled the country; Abiodun [sic] also refers to a targeted attack that informed the Appellants decision to leave. These allegations were provided to the affiants in December 2018 by the PA, and were not within their personal knowledge. More importantly their accounts are inconsistent with the Basis of Claim (BOC) narratives.

[34] In his BOC narrative and oral testimony, the PA never mentions any attempt by anyone to kill the Appellants, prior to their fleeing Nigeria. The PA alleged that he received a death threat from Ibrahim on October 15, 2017 over the phone during an argument, and a visit by some men to his home the same day, when he was not there. His mother reported that they said he can not hide from them, but there were no death threats or violence. The PA wrote in his narrative that he never believed Ibrahim would attempt to kill him, and because the evidence does not support it, I don't believe it either.

[35] Nowhere in the evidence is there any credible explanation for what Ibrahim would gain in killing the PA, since Ibrahim currently has the PA's invested money, all the assets of the joint venture and all the profits from the diesel delivery business. The joint venture agreement was prepared by lawyers and it calls for arbitration of any dispute between the parties. I find it unlikely, on a balance of probabilities, that Ibrahim's first inclination in resolving this civil dispute would be recourse to murder.

[36] I find that the Appellants left Nigeria, three days after the PA's return from Qatar, based on one alleged death threat and also based on his mother and brother's advice that its [sic] not safe to stay around "…considering the rising trend of murder case, kidnapping and cult activities which has attained a record high in the state…". No one went to the police. I conclude, on a balance of probabilities, that when the Appellants left Nigeria there was no objective basis for the PA fearing a risk to his life at the hands of Ibrahim or his associates.

[Footnotes omitted.]

[8] The above analysis of the new evidence is unimpeachable. It does strain credulity that the affiants spoke of an assassination attempt but that information is nowhere to be found in the Principal Applicant's Basis of Claim form or in his lengthy amended personal narrative sent to the RPD on May 24, 2018: see Certified Tribunal Record at pp 192-201. Later in a brief affidavit prepared in support of an application to file late documents before the RPD, the Principal Applicant said "there was attempts to kill me and family" but no particulars were provided: see Certified Tribunal Record at p 77. The RAD cannot be faulted for its skepticism about this major inconsistency. If there had been attempts to kill the Principal Applicant or his family, those details would most assuredly have been provided.

[9] To the extent that my decision on this point is inconsistent with the holding in *Yurtsever*, above, I decline to follow that decision.

II. Was an Oral Hearing Required?

[10] The Applicants argue that it was a breach of procedural fairness for the RAD to refuse their request for an oral hearing under s 110(6) of IRPA. They say that the RAD decision simply repeats the language of this provision and presents no line of analysis that allows them to understand why an oral hearing was not convened. This is not a fair characterization of the RAD's decision.

[11] If the RAD's analysis of the s 110(6) criteria lacked depth, some of the responsibility has to be borne by the Applicants for failing to advance any substantive arguments about the materiality and probative value of their new evidence such that an oral hearing was warranted.

Under s 3(3)(g)(v) of the RAD Rules, SOR/2012-257, detailed submissions as to why a hearing should be convened are required.

[12] The circumstances under which the RAD may convene an oral hearing are set out in s 110(6) of the IRPA which provides:

(6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)	(6) La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois :
(a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;	a) soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;
(b) that is central to the decision with respect to the refugee protection claim; and	b) sont essentiels pour la prise de la décision relative à la demande d'asile;
(c) that, if accepted, would justify allowing or rejecting the refugee protection claim.	c) à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas.

[13] The above provision affords a discretion to the RAD to decline to convene an oral hearing where it is of the opinion that the new evidence being tendered does not raise a serious issue with respect to the appellant's credibility, is not central to the refugee decision or would, if accepted, not be determinative.

[14] Fundamentally the RAD concluded that the new evidence was not material to the outcome because it was inherently unreliable and untrustworthy. It was based on hearsay and contained several inconsistencies and implausibilities. Among other things, the RAD noted the extraordinary coincidence that the agents of persecution suddenly appeared in every one of the

proposed IFAs in a short period of time. The RAD also reasonably noted the absence of a plausible motive for the alleged persecutor to continue to pursue the Principal Applicant and it was troubled by his failure to report the allegations to the police. A further valid concern can be found at paragraph 32 of the reasons:

> [32] The affiants Ogar, Kehinde, Inibu, Martins, Abiodum and mother-in-law Alaba all say they told the visitors that the PA was in Qatar, even though the PA had left Qatar and been in Canada since late October of 2017, over a year earlier. Mother-in-law Alaba was with the Appellants in mid-October of 2017 when they made their plans to leave Nigeria, but on December 7, 2018 she tells the inquiring visitor that the PA was in Qatar. I have considered the possibility that all five affiants had the presence of mind to lie about the Appellants' whereabouts in order to protect them, except that the truth that they were in Canada could have achieved the same result of protecting them. I find it not credible that four old friends and his own mother-in-law did not know that the PA and family were in Canada for over a year, when describing his location in late 2018.

[15] In my view, it is within the RAD's discretion to decline to convene an oral hearing when it has an analytical foundation for disbelieving new evidence submitted by third parties. For purposes of applying s 110(6), the RAD is not required to accept every story that a third party may be prepared to submit, however fanciful it may be. Presumably that is why s 110(6) says "… may hold a hearing, if in its opinion…". Having regard to the identified frailties of the new evidence submitted by the Applicants, no breach of fairness arose from the RAD's refusal to convene an oral hearing.

III. Internal Flight Alternatives

[16] Counsel for the Applicants did not make oral submissions concerning the RAD's finding that viable IFAs were available in Abuja, Ibadan, Port Harcourt and Benin City. Instead, he

asked the Court to consider his written submissions and I have done so. The argument the Applicants make is that the RAD was selective in its treatment of the new evidence of the hardships the family would encounter upon a return to Nigeria. This is an issue attracting the reasonableness standard of review.

[17] I can find no reviewable error in the RAD's reasons dealing with this issue. The RAD fairly characterized both parents as highly educated, fluent in English and with excellent employment histories. The IFA cities were large multicultural centres where intolerance for non-indigenous settlers was found not to be a significant barrier to relocation.

[18] The RAD's finding that the hardships the Applicants might face would not meet the high threshold of jeopardy to life and safety was reasonable on the record before it. This argument is no more than a request to the Court to re-weigh the evidence and it does not fall within the scope of the Court's authority on judicial review.

[19] For the foregoing reasons, this application is dismissed.

[20] Neither party proposed a certified question and no question is certified.

JUDGMENT IN IMM-1764-20

THIS COURT'S JUDGMENT is that this application is dismissed.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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