Federal Court Cour fédérale

Date: 20210630

Docket: IMM-7803-19

Citation: 2021 FC 697

Ottawa, Ontario, June 30, 2021

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

TUNJI YUSUFF AYINLA
SADIAT OLUWABUNMI AYINLA
KADIJAT OLUWADARASIMI AYINLA
MALIK FOLARIN AYINLA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Defendant

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The Applicants, Mr. Ayinla [Principal Applicant], his wife [Female Applicant], and their children [Associate Applicants] seek judicial review of the November 22, 2019 decision [Decision] of the Refugee Appeal Division [RAD] pursuant to section 72(1) of the *Immigration*

and Refugee Protection Act, SC 2001 c 27 [*IRPA*]. The RAD's decision dismissed the Applicants' appeal of an August 14, 2019 decision of the Refugee Protection Division [RPD], which held that the Applicants are not Convention refugees or persons in need of protection under sections 96 and 97 of the *IRPA*.

[2] The determinative issue before the RAD was the availability of a viable internal flight alternative (IFA).

[3] For the following reasons, the application for judicial review is dismissed.

II. Background

[4] The Applicants are all citizens of Nigeria and fear harm from a man named Segun, a former partner of the Female Applicant and an alleged kingpin in the Badoo gang.

[5] From February to July 2009, the Female Applicant was in a relationship with Segun until the Principal Applicant and the Female Applicant were married in 2010 after which Segun began to threaten the Applicants. Segun came to the Female Applicant's workplace to threaten her and physically assault her. She reported the threats to the police but they told her that Segun was a kingpin of the powerful Badoo gang and was therefore very dangerous. In 2013, Segan attacked the Principal Applicant. He reported the assault to the police leading to his arrest in 2014, though the police released him without charges.

[6] The Applicants believed that Segun had left Nigeria as of 2015, however, on November 25, 2017, Segun came to the Applicants' residence and attacked three people, including two of the

Associate Applicants. The Principal Applicant returned to the residence accompanied by the police after receiving calls from the neighbours. The injured Applicants spent one week in the hospital recovering from their injuries.

[7] On December 17, 2017, the Applicants left Nigeria for the United States. Two days later, they proceeded to Canada through an irregular border crossing where they initiated refugee claims. On August 14, 2019, the RPD denied the Applicants' claim.

III. The Decision

[8] While the RPD denied the Applicants' claim based on a lack of credibility and a viable IFA in Port Harcourt, the RAD held that the issue of a viable IFA was determinative and therefore it was not necessary to consider the issue of credibility.

[9] The RAD rejected new evidence submitted by the Applicants including affidavits of two former neighbours and the sister of the Female Applicant. The RAD found that these affidavits were not relevant to the IFA issue.

[10] The RPD and the RAD both relied on Jurisprudential Guide TB7-19851 in concluding that Port Harcourt is an IFA for Nigerian claimants fleeing non-state actors. The Jurisprudential Guide was subsequently revoked on April 6, 2020.

[11] The RAD found that there was no evidence connecting the Badoo gang to other gangs throughout Nigeria. There was also no evidence that Segun was capable of searching the entire country to locate the Applicants in Port Harcourt. The RAD therefore found that there was "not a

serious possibility that the Appellants would be persecuted or that, on a balance of probabilities, the Appellants would be personally subjected to a danger of torture, face a risk to their lives, or a risk of cruel and unusual treatment or punishment in Port Harcourt."

[12] The RAD also found that the Applicants had not established that they were persons in need of protection pursuant to section 97 of the *IRPA* due to general criminality in Port Harcourt.

IV. Issues and Standard of Review

[13] The issues are:

(1) Was the RAD's rejection of new evidence and refusal to conduct a hearing reasonable?

(2) Was the RAD's determination that the Applicants had a viable IFA reasonable?

[14] As the Supreme Court of Canada noted in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], there is "a presumption that reasonableness is the applicable standard whenever a court reviews administrative decisions" except where legislative intent or the rule of law suggests otherwise (*Vavilov* at paras 16, 23). Neither of these exceptions apply here. The applicable standard of review is therefore reasonableness.

[15] In applying the reasonableness standard, the Court must not assess the tribunal's reasons against a standard of perfection but must ask if the decision under review "bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at paras 91, 99).

V. Parties' Positions

A. *Was the RAD's rejection of new evidence and refusal to conduct a hearing reasonable?*

(1) Applicants' Position

[16] The Applicants submit that the three affidavits were relevant to the IFA issue on appeal because they provide evidence that the agent of persecution continues to be motivated to find them. This is relevant to the risk they face throughout Nigeria. They also argue that the affidavits are relevant to the Applicants' credibility, a relevant factor in the assessment of IFA risk.

[17] The Applicants further argue that the RAD's refusal to conduct a hearing was a result of its erroneous rejection of their new evidence. They state that a hearing was warranted as the new evidence goes to credibility, which was at issue before the RPD.

(2) Respondent's Position

[18] The Respondent argues that the onus to establish the admissibility of new evidence lies with the Applicants. As the only issue considered by the RAD was the availability of an IFA, and the affidavits were not relevant to the issue of an IFA, the RAD reasonably rejected the evidence.

[19] The Respondent also argues that since the RAD reasonably rejected the new evidence it could not have conducted an oral hearing.

B. *Was the RAD’s determination that the Applicants had a viable IFA reasonable?*

(1) Applicants’ Position

[20] The Applicants submit that the RAD applied the wrong test to determine whether there was a serious possibility of persecution in Port Harcourt. The Applicants state that the RAD’s statement that the Badoo gang did not have the ability to search the entire country amounted to an application of a test on whether they could search every inch of land in Nigeria. The Applicants argue that the RAD should have focused on the connections and contacts with police, authorities, or other gangs that the Badoo gang could have used to locate people in other parts of Nigeria.

[21] The Applicants also argue that the RAD erroneously considered the public nature of the Principal Applicant’s real estate business under the second prong of the test that pertains to the reasonableness of Port Harcourt, as opposed to the first prong of the test that assesses the risk of the Applicants’ being persecuted in Port Harcourt.

[22] Lastly, the Applicants argue that the RAD erred in adopting the RPD’s reasons for finding that Port Harcourt was reasonable instead of conducting a fresh analysis.

(2) Respondent’s Position

[23] The Respondent argues that the Applicants have the onus to establish that the proposed IFA is not viable and the Applicants failed to discharge their burden.

[24] The Respondent further argues that the RAD's statement that the agent of persecution would not be able to search the entire country was not an assessment of whether he could search every inch of land in Nigeria. Rather, it was a statement that the Applicants had adduced insufficient evidence to show how the agent could locate them throughout Nigeria.

[25] Finally, the Respondent argues that the RAD adopted the RPD's reasoning and analysis only after independently reviewing the evidence and this finding was therefore reasonable.

VI. Analysis

A. *Was the RAD's rejection of new evidence and refusal to conduct a hearing reasonable?*

[26] The RAD can consider new evidence pursuant to section 110(4) of *IRPA* only in narrow circumstances. The onus is on the appellant to explain how the evidence meets the admissibility requirements (*Refugee Appeal Division Rules*, SOR/2012-257, r 3(3)).

[27] In *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96, the Federal Court of Appeal determined the five questions that the RAD should consider in deciding whether to admit proposed new evidence under subsection 110(4) of the *IRPA*. These questions are whether the proposed evidence is: 1) credible; 2) relevant; 3) new; 4) material; and 5) subject to express statutory conditions.

[28] The relevance factor was the only issue pertinent to the Applicants' claim. To be relevant the evidence must be "capable of proving or disproving a fact that is relevant to the claim for

protection" (*Singh* at para 38). Here the only facts that are relevant to the claim for protection relate to the availability of an IFA.

[29] In their submissions to the RAD, the Applicants explained that the affidavits confirmed the nature of the past, present, and future persecution of the Applicants. However, the Applicants provided no explanation of how these documents could be relevant to the risk of persecution in Port Harcourt.

[30] Before this Court, the Applicants argue that the documents are relevant to the IFA issue because they provide evidence that the agent of persecution continues to be motivated to find them and they support the Applicants credibility, which is relevant in the assessment of IFA risk. However, while the evidence may show that the Applicants' agent of persecution continues to be motivated, it does not show how he could locate them or whether he would travel to Port Harcourt. The Applicants' credibility is not relevant to their IFA claim in this case. The Applicants have not shown how the evidence they sought to adduce is capable of proving or disproving any fact related to the IFA issue. The RAD reasonably rejected the evidence on this basis.

[31] Given that the RAD reasonably rejected the new evidence submitted by the Applicants it was not open to the RAD to conduct an oral hearing.

B. *Was the RAD's determination that the Applicants had a viable IFA reasonable?*

[32] *Armando v Canada (Citizenship and Immigration)*, 2020 FC 94 at para 37 provides a recent articulation of the conjunctive two-part test to determine the availability of an IFA:

(1) The Board must be satisfied, on a balance of probabilities, that there is no serious possibility of the claimant being persecuted in the part of the country in which it finds an IFA exists; and

(2) Conditions in that part of the country must be such that it would not be unreasonable, in all the circumstances, including those particular to the claimants, for the claimants to seek refuge there.

[33] As noted by the Respondent, once an IFA is proposed, the burden is on the Applicants to establish that it is not viable either because there is a serious risk of persecution in the proposed IFA or because it would be unreasonable for the Applicants to seek refuge in the proposed IFA.

[34] While the Applicants argued before this Court that the RAD should have considered the connections and contacts the Badoo gang may have with police, authorities, and other gangs, the Applicants presented no evidence of such connections in their submissions to the RAD. The Applicants discussed the existence of other gangs in other areas of Nigeria, including Port Harcourt, but the evidence did not indicate how their existence could facilitate the Badoo gang in finding the Applicants.

[35] The Applicants also made submissions on the nature of the persecution the gang would subject them to if they found them, however, this does not explain how the gang could find them. I agree with the Respondent that the Applicants failed to establish that there was a serious possibility of their persecution in Port Harcourt.

[36] The Applicants submit in paragraph 15 of their written submissions that "In paragraph 18 the RAD says that the Applicants real estate business is alleged to put them in more of a public light, is under the reasonableness discussion by the RAD. This issue does not go to

reasonableness but to risk, the second part of the test”. In their submissions to the RAD, however, the Applicants argued this point under the second prong of the IFA test. The RAD was responsive to this submission and addressed it sufficiently in the context of the reasonableness of the IFA.

[37] Further, on the second prong, the Applicants also failed to show that it would be unreasonable for them to seek refuge in Port Harcourt. As noted by the RAD, for a proposed IFA to be unreasonable, it “is not enough that the Appellants would face hardship. The conditions must be such that their lives and safety would be in jeopardy.”

[38] In their submissions to the RAD, the Applicants only arguments on the unreasonableness of relocation in Port Harcourt pertained to a generalized risk of ethnic discrimination throughout Nigeria, which the RAD found to be less prevalent in Port Harcourt, and the public nature of the Applicants’ employment. The Applicants failed to show that their lives or safety would be in jeopardy because of either. Consequently, the RAD’s finding that the Applicants had not established that Port Harcourt was not a viable IFA was reasonable.

VII. Conclusion

[39] The RAD reasonably rejected the new evidence presented on the basis that the Applicants had failed to demonstrate its relevance to the IFA issue. The RAD did not have to conduct an oral hearing. The RAD’s determination that Port Harcourt was a viable IFA for the Applicants was reasonable given that the Applicants failed to establish either that there was a serious risk of persecution or that it was unreasonable for them to seek refuge in Port Harcourt.

[40] The application is dismissed. Neither party has suggested a question for certification and none arises.

JUDGMENT in IMM-7803-19

THIS COURT'S JUDGMENT is that:

(1) The application for judicial review is dismissed.

(2) There is no question for certification.

(3) There is no order as to costs.

"Paul Favel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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