

Federal Court



Cour fédérale

**Date: 20220217**

**Docket: IMM-1614-21**

**Citation: 2022 FC 212**

**Toronto, Ontario, February 17, 2022**

**PRESENT: Madam Justice Go**

**BETWEEN:**

**ELEOJO HELEN OKPANACHI  
EWAJESU IKOOJO OLUSESI  
MORENIKE ENE OLUSESI**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] Ms. Eleojo Helen Okpanachi and her two daughters [together the Applicants] seek judicial review of the Refugee Appeal Division [RAD] decision [Decision] finding that they were not Convention refugees or persons in need of protection under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. Ms. Okpanachi [the Principal Applicant] made a

claim against Nigeria, where she is a citizen, and her two children [the Minor Applicants] made a claim against the United States of America [US], where they were born. The Principal Applicant was married to Mr. Olufemi Ayinde from 2014 to 2017, and her refugee claim is based on fear of his family.

[2] Their arguments before this Court challenge the RAD's assessment of the Principal Applicant's credibility, subjective fear, and prospective fear. The Respondent argues that the RAD's decision was reasonable on all fronts.

[3] I find the RAD erred by failing to consider the Applicant's testimony in light of the "Chairperson's Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution" [Gender Guidelines]. This failure rendered the Decision unreasonable and I set it aside.

## II. Background

### A. *Factual Context*

[4] In 2010, the Principal Applicant, a Christian from Benue, met Mr. Ayinde, a Muslim from a different ethnic group (Yoruba). They had twins in 2013. When Mr. Ayinde proposed marriage, the Principal Applicant accepted on the condition that he would become Christian. He agreed. They got married in 2014. For financial reasons, they started living at the house of Mr. Ayinde's father. The Principal Applicant alleged that Mr. Ayinde's conversion to Christianity caused his family to feud with him and herself.

[5] The Principal Applicant described in her Basis of Claim narrative [BOC] an incident implying her in-laws tried to poison her and another incident when her in-laws poured water over her head while she was praying and told her that next time it would be acid.

[6] The Principal Applicant recounted two other incidents at the hearing, which were not included in her BOC. On one occasion, in December 2014, her father-in-law slipped on some water she had accidentally spilled, and her in-laws forced her to kneel down without food for a long period of time until her father-in-law forgave her [the kneeling incident]. On another occasion, her in-laws forced her to go to the mosque to pray [the mosque incident].

[7] In January 2015, the Principal Applicant and her husband moved to Abuja for their own safety. While living in Abuja, there was a bombing by Boko Haram, so they decided to leave the country. They obtained passports and visas to travel to the US in 2015, leaving their twin daughters in the care of the Principal Applicant's parents.

[8] While in the US, the relationship between the couple deteriorated. The Principal Applicant gave birth to the Minor Applicants. Mr. Ayinde disputed whether he was the father of one of the children and left the Principal Applicant. The Principal Applicant filed for divorce on April 10, 2017. When the Principal Applicant was in the US, her in-laws allegedly took her twins away from her parents' house by force, and the children have since been converted to Islam.

[9] The Principal Applicant stated that going back to her father's hometown in Benue would put her life and the lives of her children at risk due to the violence from Fulani Herdsman. The Principal Applicant claimed she has lost a cousin during one of these attacks.

[10] The Principal Applicant did not take any step to regularize her status in the US. She and the two minor Applicants came to Canada in March 2019 and claimed asylum upon arrival.

*B. The RPD Decision*

[11] The RPD found that the Principal Applicant lacked credibility, because she had omitted from her BOC narrative incidents that were central to her claim, and because her explanations for not claiming asylum in the US were unreasonable. The RPD also concluded that she would not face a prospective risk if she were to return to Nigeria, as there was no evidence to suggest she would pursue custody of her twins, that her ex-in-laws would pursue custody of the American-born children, or that there have been any recent threats by her ex-in-laws. Finally, the RPD found that the Principal Applicant had not established she would face persecution based on her profile as a divorced woman in Nigeria.

[12] The RPD also rejected the Minor Applicants' claims, finding that although separation from their mother for children of such young age can be very difficult, analyzing separation from parents is beyond the tribunal's jurisdiction.

C. *Decision under Review*

[13] The RAD found that the RPD did not err in its credibility analysis, in its application of the Gender Guidelines, in assessing subjective fear, or in assessing prospective risk.

III. Issues and Standard of Review

[14] The Applicant submits that the RAD: (1) failed to use the Gender Guidelines in a meaningful way to assess credibility, (2) failed to properly assess subjective fear by not taking reasonable explanations into account, using outdated case law, and failing to provide clear reasons, and (3) failed to properly assess prospective fear by ignoring relevant evidence.

[15] The parties agree that all three issues are reviewable on a reasonableness standard, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[16] Reasonableness is a deferential, but robust, standard of review: *Vavilov*, at paras 12-13. The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified: *Vavilov*, at para 15. 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. Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences: *Vavilov*, at paras 88-90, 94, 133-135. For a decision to be unreasonable, the applicant must

establish the decision contains flaws that are sufficiently central or significant: *Vavilov*, at para 100.

#### IV. Analysis

[17] As noted above, I find the RAD erred by failing to consider the Applicant's testimony in light of the Gender Guidelines. These errors are set out below:

##### *Error 1: The RAD accepted the RPD's credibility finding without regard to the Gender Guidelines*

[18] The RAD accepted the RPD's finding of the credibility of the Principal Applicant on the grounds that she failed to include the kneeling incident and the mosque incident in her BOC narrative. The RPD concluded, on a balance of probabilities, the events had not occurred, and the RAD agreed with the RPD that the Principal Applicant did not provide a reasonable explanation for the omissions.

[19] The Applicants challenge this analysis, arguing that the RAD failed to consider the Principal Applicant's credibility in light of the Gender Guidelines. The Applicants argue that according to *Harry v Canada (Citizenship and Immigration)*, 2019 FC 85 [*Harry*] at para 34, if a woman has suffered abuse and has inconsistencies between her testimony and her BOC narrative, the RPD is obliged to weigh the evidence with the Gender Guidelines in mind.

[20] The Respondent submits that the Gender Guidelines are directed toward a fair hearing, but a claimant still bears the onus of proving her claim, and the Guidelines are not intended to

serve as a cure for deficiencies in a refugee claim or evidence: *Kiangebeni v Canada (Citizenship and Immigration)*, 2014 FC 395 at paras 31-33 and *Karanja v Canada (Minister of Citizenship and Immigration)*, 2006 FC 574 at paras 5-6.

[21] While I agree with the Respondent's submission in principle, in this case, the RAD's failure to consider the Gender Guidelines in assessing the omissions in question was an error.

[22] I note, first, that the RAD separated its analysis of the issue of RPD's credibility finding from its analysis of the RPD's application of the Gender Guidelines. Under the heading the "RDP did not err in assessing credibility", the RAD gave detailed analysis of the discrepancies between the BOC and the Principal Applicant's testimony at the hearing, without once referencing the Gender Guidelines.

[23] I acknowledge the Respondent's submission that a tribunal is not required to mention the Gender Guidelines to show the requisite sensitivity to gender: *Pozos Martinez v Canada (Citizenship and Immigration)*, 2010 FC 31 at para 22; *Sargsyan v Canada (Citizenship and Immigration)*, 2015 FC 333 at para 15; *Tovar v Canada (Citizenship and Immigration)*, 2016 FC 598 at paras 30-34; *Nsimba v Canada (Citizenship and Immigration)*, 2019 FC 542 at para 17. In this case, the RAD did mention and analyze the Gender Guidelines, but only *after* it had already concluded that the RDP did not err in impugning the Principal Applicant's credibility based on the omissions.

[24] The Applicants argue that although the RAD made its own assessment of the Gender Guidelines, it failed to turn its mind to how her experiences would have contributed to the omission and inconsistencies, particularly in light of her explanation at the hearing that “[s]ometimes you do not remember everything to write down when you go through bad things.”

[25] I agree with the Applicants. In adopting the RPD’s finding on credibility based on the omissions, the RAD stated that the two omitted incidents are not peripheral and the explanation “cannot, on a balance of probabilities, be reconciled with the importance she places on her faith, the repeated actions or being forced to pray, clear BOC instructions and the assistance of Counsel in preparing her BOC.” No reference was made here to the Gender Guidelines.

[26] In *Harry*, the female claimant alleged serious abuse from her romantic partner, who is the father of her child. The RPD found credibility to be the determinative issue. The RPD found that the female claimant had omitted in her written account several incidents of beating between 2007 and 2009, and that the claimant was unable to explain these omissions. The RPD then concluded that her claim lacked credibility. Before the Court, Ms. Harry argued that the RPD erred by failing to apply the Gender Guidelines, stating it was an error for the RPD to make negative credibility findings based on her failure to include several incidents of domestic abuse in her written narrative and that it was not possible for an abused woman to describe each incident of violence. Justice Russell agreed, as he explained at paragraph 34:

[34] .....Omissions and contradictions are not, *per se*, a reason to exclude consideration of the Gender Guidelines. The purpose of the Gender Guidelines is to ensure that any assessment of omissions and contradictions takes into account the factors set out in the Gender Guidelines. If what the RPD is saying here is that the “omissions” and the “contradiction” in question cannot be explained by the factors set out in the Gender Guidelines and, in particular, how



those factors may influence the testimony of women who have been the victims of persecution, the RPD does not, in fact, provide reasons why the Gender Guidelines do not impact its analysis in this case. In my view, then, the Gender Guidelines are not taken into account in a meaningful way. I think the words of Justice Gagné in *Odia v Canada (Citizenship and Immigration)*, 2014 FC 663 are equally applicable to the present case:

[9] I agree with the applicant that in order for the RPD to take the Gender Guidelines into account in a meaningful way, it has to assess a claimant's testimony while being alert and sensitive to her gender, the social, cultural, economic and religious norms of her community, and "to the factors which may influence the testimony of women who have been the victims of persecution" (*Bennis v Canada (Minister of Immigration and Citizenship)*, 2001 FCT 968 at para 14). Here, it is in the assessment of the applicant's testimony that the RPD member lacked the requisite sensitivity. In that sense, the Gender Guidelines were not properly applied and the applicant's expectations were not satisfied.

[emphasis added]

[27] Here, the RAD did not even refer to the Gender Guidelines in its credibility analysis, let alone assess why the omissions cannot be explained by the factors set out in the Gender Guidelines, before accepting the RPD's conclusion on credibility based on the omissions. As such, I find the RAD has not taken into account the Gender Guidelines "in a meaningful way" when it adopted the RPD's credibility finding based on the omissions in the BOC.

*Error 2: The RAD's finding that the RPD did not err in applying the Gender Guidelines*

[28] Rather than considering the interplay between the application of the Gender Guidelines and RPD's finding of credibility based on the omissions in the BOC, the RAD separately considered the issue of whether the RPD had erred in applying the Gender Guidelines and found that it did not. In coming to this conclusion, the RAD cited two reasons: a) the Principal Applicant has not provided a professional diagnosis to indicate she is suffering from Battered

Woman Syndrome, and b) there is no indication that the Principal Applicant was reluctant to testify at the RPD hearing. Based on these reasons, the RAD rejected the Applicant's argument that, had the Gender Guidelines been taken into account, the Principal Applicant's explanation would have been convincing and reasonable.

[29] I find three errors with the RAD's reasoning in this respect. First, as I have noted above, the RAD has already concluded that the RPD did not err in impugning the Principal Applicant's credibility based on the omissions. In effect, the RAD engaged in circular reasoning by impugning the Principal Applicant's credibility – and thus her claim about the abuse she had endured – and then used that finding to support its position that the Gender Guidelines did not apply because of the lack of evidence that warranted the application of the Guidelines.

[30] Second, the Applicant submits that in noting the absence of a professional diagnosis, the RAD was taking into account an irrelevant consideration, citing *Nara v Canada (Citizenship and Immigration)*, 2012 FC 364 at para 35. I agree. As the Applicant rightly points out, nowhere do the Gender Guidelines state a medical diagnosis is required for gender-related factors to be relevant in explaining a claimant's difficulties in giving evidence. In so finding, the RAD was placing a high evidentiary burden on the Principal Applicant – and other vulnerable claimants who suffer gender-based persecution – to prove their vulnerability through a medical diagnosis first before the RAD would consider gender-based violence in the credibility assessment.

[31] The approach taken by the RAD also runs contrary to the Gender Guidelines' acknowledgement of special problems faced by women refugee claimants in demonstrating that

their claims are credible and trustworthy due to cross-cultural misunderstandings and other factors like trauma. The reference to Battered Woman Syndrome in the Gender Guidelines is not meant as a prerequisite to its application; rather, it is listed as one of several reasons why women may be reluctant to testify at their hearing.

[32] Finally, that the Principal Applicant had a fair hearing should not be used as the only indicia of assessing whether the RPD had applied the Gender Guidelines.

[33] The Respondent argues that the RAD could be sensitive to the Principal Applicant's particular circumstances as a woman but still reasonably find credibility concerns with respect to the evidence, such as the significant omissions from the BOC narrative. I agree that applying the Gender Guidelines does not guarantee any outcome and certainly does not mean the RAD must accept the Principal Applicant's claim as credible. However, as I have concluded that the RAD has not meaningfully applied the Gender Guidelines, the matter needs to be returned to a different decision maker for redetermination.

[34] As I have decided to send the matter back on this error alone, I need not consider the other issues raised by the Applicant.

## V. Conclusion

[35] The application for judicial review is allowed and the matter is referred back for redetermination by a different decision maker.

[36] There is no question for certification.

**JUDGMENT in IMM-1614-21**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is allowed.
2. The matter is referred back for redetermination by a different decision maker.
3. There is no question for certification.

"Avvy Yao-Yao Go"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-1614-21

**STYLE OF CAUSE:** ELEOJO HELEN OKPANACHI, EWAJESU IKOOJO  
OLUSESI, MORENIKE ENE OLUSESI v THE  
MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** FEBRUARY 3, 2022

**JUDGMENT AND REASONS:** GO J.

**DATED:** FEBRUARY 17, 2022

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