Federal Court  Cour fédérale

Date: 20220331

Docket: IMM-1716-21

Citation: 2022 FC 444

Ottawa, Ontario, March 31, 2022

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

OLUWAFUNMILAYO ADIJAT OMISORE
IYIOLUWA DANIELLA OMISORE
NINILOLAOLUWA ESTHER OMISORE
OLUSORE BENJAMIN OMISORE
TOKUNBO BABATUNDE OMISORE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background and underlying decision

[1] Mr. and Ms. Omisore, their two daughters, aged 7 and 13, and their 5-year-old son, are citizens of Nigeria and are part of the Yoruba ethnic group. Mr. Omisore's family is wealthy and influential in Nigeria. His father was an engineer by training and then ended his career as a

diplomat, having been posted in such countries as Cameroon and India, and Israel as the personal assistant to the Nigerian ambassador. Mr. and Ms. Omisore assert that they fear persecution at the hands of Mr. Omisore's family, in particular his uncle, who is the chief of the Ile-Ife community, of the Ogbonya clan, in Osun State, because they are refusing to allow their minor daughters to undergo female genital mutilation. Their continued refusal has led to Mr. and Ms. Omisore experiencing threats and attacks at the hands of members of Mr. Omisore's family; the first incident occurred at their home in September 2014 during the christening of their youngest daughter, when Mr. Omisore's uncle arrived with other men and beat Mr. Omisore for continuing to refuse to allow his daughters to undergo the procedure. The second incident occurred two years later, in December 2016, when members of Mr. Omisore's family physically assaulted Ms. Omisore, breaking her wrists when she was returning home after picking up the children from school; the police were of no assistance.

[2] Feeling the mounting pressure, the applicants left Nigeria for the United States [U.S.] in March 2018, where they stayed at a friend's house for one week. They did not plan to seek protection in the U.S. on account of the U.S. administration's immigration policies. On April 3, 2018, Ms. Omisore and the children crossed into Canada and claimed refugee protection. For his part, Mr. Omisore returned to Nigeria later that month for business reasons, however, returned to the United States in October, only to then cross into Canada to reunite with his family on November 13, 2018; he too claimed refugee protection. The Refugee Protection Division [RPD] held two days of hearings. During the first day, in January 2019, the RPD indicated to Ms. Omisore that they were considering Port Harcourt and Abuja as possible internal flight alternatives [IFA]; the RPD also decided to join Ms. Omisore's application for refugee protection

with that of her husband. The second day of the hearing took place on April 30, 2019. It took the RPD over a year to render its decision, however, on June 25, 2020, it rejected the applicants' claim on the grounds that they had a viable IFA in Port Harcourt, the IFA being the determinative issue. The Refugee Appeal Division [RAD] confirmed the decision of the RPD on February 25, 2021 [RAD's decision], agreeing with the RPD that the applicants had a viable IFA in Port Harcourt and determining that the RPD did not breach the principles of procedural fairness in not providing the applicants with an opportunity to respond and make submissions prior to the RPD reviewing the most recent version of the National Documentation Package [NDP] in rendering its decision. The applicants now seek judicial review of the RAD's decision.

II. Issue and standard of review

[3] The sole issue in this application is whether the RAD's decision is reasonable, in particular its assessment of the evidence regarding the influence of Mr. Omisore's uncle and his motivation and ability to locate the applicants in Port Harcourt as well as the reasonableness of having the applicants relocate to Port Harcourt. Here, I agree with the parties that the standard of review is one of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16-17 [*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). This Court should intervene only if the decision under review does not bear "the hallmarks of reasonableness — justification, transparency and intelligibility" and if the decision is not justified "in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99). The applicants also raise the fact that the RAD failed to find a breach of procedural fairness in the RPD's failure to

advise the applicants that it was reviewing the latest version of the NDP, which post-dated the second day of the hearing, thus precluding the applicants from having an opportunity to respond and make further submissions. The applicants were also seeking an oral hearing before the RAD to address the issue, however, the RAD denied their request because they did not submit any new evidence that could justify an oral hearing under subsection 110(6) of the *Immigration and Refugee Protection Act*, SC 2001, c 27; the issue of an oral hearing was not raised before me. In any event, on the issue of procedural fairness, the applicants say that the standard of review is one of correctness. I disagree; the issue is not one of a breach of procedural fairness on the part of the RAD, but rather concerns the RAD's assessment of the RPD decision on the issue. Therefore, the issue should be reviewed under the reasonableness standard (*Larrab v Canada (Citizenship and Immigration)*, 2021 FC 135 at para 8; *Ibrahim v Canada (Citizenship and Immigration)*, 2020 FC 1148 at paras 11-17).

III. Analysis

A. *The RAD reasonably assessed the evidence regarding the influence of Mr. Omisore's uncle and his ability to locate the applicants in Port Harcourt*

[4] The applicants take no issue with the application by the RAD of the test for an IFA set out in *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706. The RAD found that the RPD correctly concluded that, on the balance of probabilities, the applicants did not establish that Mr. Omisore's uncle, being the agent of persecution, has the means to locate them in Port Harcourt. The applicants say that the RAD did not conduct its own analysis and failed to consider the evidence dealing with the influence, capacity and motivation on the part of Mr. Omisore's uncle to track them down in Port Harcourt. The RPD found that the

applicants did not establish how the uncle's influence would enable him to locate them in Port Harcourt; the RAD agreed with this assessment after reviewing the evidence. In addition, the RAD found that the fact that the RPD took note of the uncle's influence in Lagos does not imply that it accepted that the uncle is influential in Port Harcourt, as argued by the applicants. The RAD stated:

> I do not agree that by acknowledging and taking note of the evidence, the RPD accepted it; rather, the RPD was indicating that it had considered this evidence. I am not persuaded by the Appellants' argument that there is anything inherently contradictory in the RPD's reasons. The RPD clearly did *not* accept that the evidence established, on a balance of probabilities, that the agent of persecution had the means to locate the Appellants in Port Harcourt. On an independent assessment, I find no error in this conclusion, for reasons that I explain in the following paragraphs.

[5] Second, the RAD found that the evidence was insufficient to demonstrate that the uncle had the means to locate the applicants in Port Harcourt:

> Although the Appellants repeatedly referred to "influence" they provided no examples of how the Associate Appellant's uncle has exercised influence in the past, with whom, or to what end. There is no evidence that the uncle's influence extends beyond Lagos or the immediately adjacent area. I find it speculative to conclude that, because the Associate Appellant's uncle is a successful businessman in Lagos, he could locate the Appellants in Port Harcourt.

[6] I put it to the applicants' counsel to identify for me the evidence which would tend to support his clients' assertions and which was insufficiently addressed by the RAD; I was directed to the following paragraph of the RAD decision:

> [14] The Associate Appellant testified that his family, particularly his uncle, is wealthy and influential in the community. According to the Associate Appellant, the family is into politics, are

> successful businessmen, and are all over Nigeria. He gave the name of his uncle's steel company in Lagos and testified that the company gets contracts from state governments like Osun and Oyo. His testimony was that his uncle has many thugs and has used violence to interfere at a polling station during an election. He further testified that in reference to his father's lineage in Port Harcourt "they are nine." The RPD noted that he testified that one of his father's relatives is a senior executive with Shell in Port Harcourt. Asked if he could live in Port Harcourt, he said that he could not, because it is too expensive, militants have bombed the pipelines, and his children would be at risk of kidnapping for ransom because kidnappers would think he was wealthy because of his family name.

[7] If that is all the evidence to support the contention that Mr. Omisore's uncle has the motivation and ability to track down the applicants in Port Harcourt (a city of two million people about 500 kilometres from Osun State and about 400 kilometres from Lagos, where the uncle seems to have business interests), I am unable to say that the findings of the RAD are unreasonable. Causing havoc at a local polling station is one thing, but extrapolating that assertion to the level of heightened political influence necessary to establish not only the capacity but also the motivation to cause harm is a stretch in this case. I have not been pointed to any further direct evidence on this point and therefore see nothing unreasonable with the RAD's determination; reassessing the evidence is not for me to do (*Vavilov* at para 125).

B. *The RAD reasonably assessed the evidence regarding the reasonableness of the applicants relocating to Port Harcourt*

[8] The applicants argue that the RAD did not meaningfully consider the evidence regarding the inherent and prevailing harsh conditions in Port Harcourt, such as a high rate of crime, discrimination against non-indigene settlers, language barriers, endemic environmental pollution and high unemployment rates (*Haastrup v Canada (Citizenship and Immigration)*, 2020 FC 141

at paras 36-45). They add that their profile as a family with three young children makes them more susceptible to these harsh conditions. The applicants further argue that the RAD failed to comprehend the evidence regarding the presence of a family relative in Port Harcourt.

[9] I should first mention that, before the RAD, the applicants did not challenge or take any issue with the RPD's findings that they failed to establish that it would be objectively unreasonable for them to relocate to Port Harcourt, in particular, the RPD's determinations (1) that Mr. and Ms. Omisore have above-average employment prospects in Port Harcourt given their educational levels, which are higher than average for Nigeria, their employment histories and their language skills, (2) that housing costs in Port Harcourt would not constitute an obstacle so as to make relocation there unreasonable, (3) that indigeneship would not be a barrier for the applicants which would rise to a level such that Port Harcourt would not be viable as an IFA, (4) that the incidence of crime in Port Harcourt was a generalized risk and any additional costs that might be required to run a business securely there would not make relocation unreasonable, and (5) that given their personal circumstances, including ethnic identity, religious belief, the children's access to education, access to health care, the applicants did not establish, on a balance of probabilities, that relocation to Port Harcourt would be unreasonable or expose them to undue hardship. I therefore see no reason why I should address these issues (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 26). In any event, the question was not pressed before me.

C. *The RAD did not err by finding that the RPD did not breach procedural fairness principles*

[10] As stated earlier, the hearings before the RPD ended on April 30, 2019, however, the decision was rendered over a year later, on June 25, 2020. The NDP package to which reference was being made during the hearings was updated to March 29, 2019. However, prior to rendering its decision, the RPD reviewed a version of the NDP updated to April 9, 2020. The applicants took issue before the RAD with what they saw as reliance by the RPD on a version of the NDP that was updated after the hearing had concluded, without the RPD advising the applicants and providing them with an opportunity to address further issues that may have arisen. The RAD made the following determination:

> The Appellants argue that, by reviewing documentary evidence more than a year after the Appellants' hearing, the RPD relied on "facts discovered following the hearing" and did not allow them an opportunity to respond. I find no merit in this argument. As the Appellants' Memorandum notes, the RPD reviewed the version of the [NDP] for Nigeria dated April 9, 2020, current at the time of the decision, found that none of the new elements in the updated NDP weighed against the Appellants' fear, and relied on the version of the NDP dated March 29, 2019. The March 29, 2019 version of the NDP was disclosed to the Appellants, in accordance with Rule 33(2) of the *Refugee Protection Division Rules*, and entered as Exhibit 3 in the RPD proceedings.

[11] In short, the RPD did not rely on any evidence in the updated NDP package. Rather, the RPD consulted the version of the NDP updated to April 9, 2020, to make certain that nothing had changed in the applicants' favour and in finding that such was not the case, made it clear that it only relied on the NDP current as of March 29, 2019. I see nothing unreasonable in the RAD's finding that no breach of procedural fairness took place.

[12] The applicants further argue that the RAD erred in finding that the RPD did not commit a breach of procedural fairness by denying them the opportunity to respond to concerns that the RPD had raised in its decision. They submit that they did not have the opportunity to address the issues that "agitated the panel's mind" and that the "applicants did not have the telepathic power to see through the mind of the panel." The applicants rely on *Miwa v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 8239 (FC), where the Convention Refugee Determination Division was found by this Court to have breached procedural fairness by assessing the authenticity of a document purportedly establishing the applicant's heritage after having set its own definition of "native" without seeking further clarity on the issue from the applicant. I cannot see how this decision assists the applicants and agree with the Minister that the RAD reasonably determined that the applicants were not denied the opportunity to respond to concerns raised by the RPD. As the RAD found, the applicants were given the opportunity to address the RPD's concerns:

> The RPD specifically identified IFA in Port Harcourt or Abuja as an issue. The onus, at that point, shifted to the Appellants to establish that they did not have a viable IFA in either location. It was up to the Appellants to establish how the agent of persecution would locate them in Abuja or Port Harcourt. . . . If they had evidence to demonstrate how the agent of persecution could locate them in Port Harcourt, they should have presented it. The hearing concluded on April 30, 2019. The decision is dated June 25, 2020. If they had post-hearing submissions or further evidence to present, they could have applied to do so. If they subsequently obtained evidence that they could not reasonably have obtained before the decision, they could have applied to submit it to the RAD. They have not done so.

[13] I have not been persuaded by the applicants that the RAD's determination on this issue is unreasonable; it is certainly not for the RPD to point out to the applicants the gaps in their evidence. The RPD identified Port Harcourt as a possible viable IFA during the first day of the

hearing. It was the applicants' burden to demonstrate that the proposed IFA is unreasonable (*Iyere v Canada (Citizenship and Immigration)*, 2018 FC 67 at paras 32-35); they failed to do so and I see nothing unreasonable with the RAD's decision. I would therefore dismiss the present application for judicial review.

JUDGMENT in IMM-1716-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. There is no question for certification.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Idorenyin E. Amana Esq.	FOR THE APPLICANTS
Chantal Chatmajian	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Amana Law Office Cornwall, Ontario	FOR THE APPLICANTS
Attorney General of Canada Montreal, Quebec	FOR THE RESPONDENT