Federal Court Cour fédérale

Date: 20220421

Docket: IMM-4030-21

Citation: 2022 FC 573

Ottawa, Ontario, April 21, 2022

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

KESS IGHODARO AJAYI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Kess Ighodaro Ajayi, the Applicant, challenges the decision of the Refugee Appeal Division (RAD), having confirmed that the Refugee Protection Division (RPD) was correct in finding that the Applicant is neither a Convention refugee nor a person in need of protection.

[2] The judicial review application is made pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [the Act]. For the reasons that follow, the application must be dismissed.

I. The facts

[3] The Applicant is a citizen of Nigeria who seeks the protection of Canada under sections 96 and 97 of the Act. He fears persecution at the hands of the Fulani herdsmen, claiming that their interests are protected by the government of Nigeria.

[4] The incidents that would give rise to the fear of persecution relate to a parcel of land leased by the Applicant and his business partner in 2015. They operated a poultry farm in the Delta state of Nigeria. We understand that cattle presumably owned by the Fulani herdsmen came on the land farmed by the Applicant to graze. The herdsmen were asked to stop, and evidently, it was to no avail. Surprisingly, the Basis of Claim (BOC) does not spell out the reasons why the Applicant seeks Canada's protection. There are no particular incidents to which reference is made. In fact, we were referred to the BOC as being where the relevant facts are to be found. There is little to be found.

[5] The Applicant complained generally about being harassed by the Nigerian police because of his criticism of the administration of Nigeria's President. No detail is offered of what constitutes the harassment complained of. Then, the Applicant asserts that a member of his staff was abducted (March 2017) by unknown gunmen: a ransom had to be paid for his release. Again, very little is offered as to the facts and who was responsible for the kidnapping. After the

Applicant had left Nigeria, he claims that his business partner was assassinated (August 2017) by the Fulani herdsmen. An affidavit by one Aliagwu Edwin, found on this record, specifies that the murder was committed "by gunmen", without any other reference.

[6] These are the only specific incidents referred to by the Applicant. The rest of his BOC is dedicated to general complaints about the Fulani herdsmen and the "Buhari Administration". The herdsmen are said to terrorize communities. The Applicant states that they are included in a global terrorism index, with data showing 1,000 people, on average, killed every year. As for the "Buhari Administration", those who are critical of it are labelled as such "and you could be killed by the Police or the Fulani Herdsmen" (BOC, para 3).

[7] In fact, the BOC seeks to establish some sort of relationship between the herdsmen and the government. The Applicant claims that the herdsmen were not heard of until the Buhari "era" began. He asserts that the "Fulani Herdsmen is like an institution the government deployed to wipe out any form of "Anti-Criticism" [*sic*]". The Applicant says he is "a target of oppression" (BOC, para 3). He argues that he cannot return to his country because of the threat to his life and his family is not safe. "The present administration is using the Fulani Herdsmen to terrorize any perceived enemies" (BOC, para 8).

[8] I have not been able to locate in the Certified Tribunal Record (CTR) any information, other than the Applicant's broad statements, that could personalize the general threat that is said to be posed by the herdsmen and the government in a country of some 210 million people. At the

hearing, I confirmed with counsel for the Applicant that there was no granularity to be found on this record.

II. The RPD and RAD decisions

[9] The decision under review is of course that of the RAD. Nevertheless, the RPD decision provides in my view some needed context because the panel heard the Applicant and concluded that there was no serious possibility of persecution; the view taken was that he would not be subjected to a risk to his life, or cruel and unusual treatment or punishment, if he were to return to his country of nationality. In a word, there is not, on a balance of probabilities, a likelihood of suffering a prospective risk, the same conclusion reached by the RAD.

A. *The RPD decision*

[10] The RPD found the Applicant to lack credibility. He failed to provide details and was evasive concerning certain incidents deemed to be at the heart of this refugee protection claim. For instance, the Applicant's criticism towards the government, which is said to be responsible for the harassment suffered by the Applicant, was limited to being shared with the farm employees and with friends. This, in the view of the RPD, constitutes minimal political involvement: he was not publicly active and he is not an activist.

[11] The incident involving the kidnapping of a staff member is considered vague. The Applicant is said to have provided scant details. In fact, Aliagwu Edwin claimed in his affidavit having witnessed the kidnapping, which was denied by the Applicant before the RPD. But the

Applicant was not present either. Similarly, the lack of details about the murder of the Applicant's business partner in August 2017 is explained by the Applicant as being because he had already left for the United States (June 2017). For the RPD, assuming a murder took place, it does not believe there would be no trace: no media report, no police report, no death announcement, no medical announcement.

[12] There was no evidence relating to the parcel of land that the Applicant leased (the RPD noted the confusion about owning the farmland; it seems that the Applicant and his business partner owned the poultry farm (chicken coop), but not the land on which it was operated), nor any evidence of alleged police complaints made by the Applicant, sale of vehicle and other possessions as he left Nigeria. The explanation offered by the Applicant is that his apartment in Nigeria was broken into in August 2017, after he had already departed for America. There is no indication of a burglary in the BOC; furthermore, Aliagwu Edwin's affidavit mentions unsuccessful efforts to trace "landed document", without saying a word about a burglary (the affidavit is ostensibly dated September 9, 2020).

[13] The RPD panel was also critical of the Applicant's failure to amend his BOC (there are on file three BOC forms) after his divorce in June 2018. The fear of agents of harm threatening the Applicant's family would have required diligence in mentioning the divorce. As a matter of fact, the Applicant confirmed before the panel (hearing took place on October 27, 2020) that neither his family nor his brother have received threats; indeed his children have attended the same school since they moved in June 2018.

[14] As mentioned, the Applicant went to the United States in June 2017. When questioned by the panel why he left without his family, he said that he wanted to find a safe place to “relax”. According to the RPD, “(h)e wanted to see what would happen with the farm and he could not afford to bring his family” (RPD Decision, para 45). The RPD notes that the Applicant did not say that he left because of fear for his life or persecution. It is, states the RPD, rather that the Applicant left not “because he feared for his life, but rather to flee an unpleasant situation” (RPD Decision, para 46).

[15] The final issue concerning the Applicant’s credibility was the reasons given for leaving the United States to come to Canada. Before the RPD, he advanced that he came to Canada (on October 15, 2017) because “he found the American culture to be too violent and he did not have a job in that country” (RPD Decision, para 47). The BOC provided yet a different reason: the Applicant did not have the financial means to claim asylum in the United States.

[16] The RPD stated another basis for concluding that the Applicant had not discharged his burden of establishing a serious possibility of persecution if he returned to Nigeria. At paragraphs 36 and 37, the RPD concludes that the Applicant does not face a prospective risk. The Applicant told the panel that following his business partner’s murder, he had decided to let it go. The RPD found “that the Fulani herdsman [*sic*] would no longer have any interest in attacking the claimant or his family since he is no longer operating the farm” (RPD Decision, para 37). Moreover, the absence of a connexion with the herdsmen and, indeed, the lack of evidence concerning the Applicant’s public pronouncements of his political opinion made the panel conclude that there would be no interest in pursuing the claimant.

B. *The RAD decision*

[17] It is the issue of the prospective risk faced by the Applicant if he goes back to Nigeria that was considered by the RAD to dispose of the appeal from the RPD decision.

[18] The RAD identified eight arguments presented on appeal about the RPD decision. But it did not address these, finding instead that there were different determinative issues. It found that the determinative issues were a well-founded fear of persecution at the hands of the Nigerian government and the police, and whether there exists a forward-looking risk to life or cruel and unusual treatment from the Fulani herdsmen.

[19] The Applicant specifically raised in his memorandum of argument before the RAD the matter of paragraphs 36 and 37 of the RPD decision. The Applicant complained before the RAD about what he considered to be the reasons given for concluding that neither the Fulani herdsmen nor the police no longer have interest in him. The paragraphs were not clear and they did not provide sufficient grounds to reach a conclusion.

[20] On the fear of persecution on the basis of the Applicant's political opinion, the RAD conducted some analysis to conclude that the Applicant's political involvement was minimal, which is not sufficient to establish a well-founded fear of persecution. It was noted that there is no evidence of police harassment; similarly, there was no evidence of police reports relative to incidents reported by the Applicant. The RAD concludes that, "having reviewed the objective evidence, I find that the Appellant has not established, on a balance of probabilities, that he has

the profile of those individuals facing persecution in Nigeria because of their criticisms of the government" (RAD Decision, para 10).

[21] As for the forward-looking risk, the RAD chose to consider the alternative determination made by the RPD at paragraphs 36 and 37 of its decision.

[22] The RAD noted that the Applicant had decided to abandon the farmland; indeed, he was not the owner of the parcel of land and, as a matter of fact, his lease expired in January 2020. The panel added that when the Applicant worked at the farm, it was on a part-time basis, only on weekends. That, according to the panel, does not establish any continued interest in the Applicant on the part of the Fulani herdsmen.

[23] As part of the forward-looking risk, the RAD considered relevant the risk, if any, faced by the Applicant's family in Nigeria. The fact that the herdsmen have not searched for the Applicant was seen as indicative of a lack of interest in the Applicant.

[24] That forward-looking risk was also found to be less than likely because the Applicant's testimony was vague and was characterized as a fear of general criminality; the Applicant, when he testified, indicated that he was speaking generally and not about himself in particular. He said, "generally speaking, no one is safe". The conclusion reached by the RAD is encapsulated in paragraph 19 of its decision:

> However, as already discussed, the Appellant has not established on a balance of probabilities that he has the profile, which would attract a serious possibility of persecution from the Buhari government or the police. Furthermore, the Appellant testified that

> the Fulani herdsmen attacked him because he operated the poultry farm. On a balance of probabilities, the Appellant was targeted by the Fulani herdsmen because of his farm, not because of his political opinion. Moreover, even if the Fulani herdsmen were indeed looking for the Appellant when they kidnapped his employee in March 2017, given the passage of more than four years since this incident, the absence of any incidents or approaches by the Fulani herdsmen towards the Appellant's family since his departure from Nigeria and the fact that the Appellant no longer operates a farm or owns any farmland in Nigeria, I find that the Appellant has not established a forward-looking risk within the meaning of section 97(1)(b) of IRPA from the Fulani herdsmen in Nigeria.

III. Analysis

[25] As I understand it, the Applicant raises one issue in his judicial review application: did the RAD address a new issue without giving the Applicant an opportunity to be heard?

[26] The written case on behalf of the Applicant, at paragraphs 11 and 12, complains that he should have been provided an opportunity to provide explanations for what is presented as a new issue. The memorandum of fact and law also contends that the "RPD never concluded that the applicant had not established on a balance of probabilities that the Fulani herdsmen had a continued interest in him" [emphasis in original] (Applicant's memorandum of fact and law, para 12). I will address both issues, starting with the second one.

[27] It appears that the Applicant's contention is that the RPD was not clear enough in that it did not speak in terms of having decided on a balance of probabilities that there was no prospective risk if returning to Nigeria. Instead, it spoke in terms of not believing in the herdsmen or the police having an interest in the Applicant. I can see no requirement that the

words “on a balance of probabilities” must be part of the decision. The RPD, in its decision, can hardly be any clearer. It declares at paragraph 37 that it believes that the Fulani herdsmen no longer have an interest in attacking the Applicant or his family since he is not operating a farm anymore. It is made clear that the interest of the herdsmen is a function of the use made by them of the farmland occupied by the Applicant. That ended some time ago. The same belief is expressed about any police interest in pursuing the Applicant for his political opinions. The criticism addressed at the government was limited to such a limited audience that it was unlikely that it would be of any interest to the authorities. Concluding as did the decision maker that it does not believe in the agents of persecution having any interest, for the reasons given throughout the decision, signals at least a conclusion on a balance of probabilities. It was not shown how the RAD was unreasonable in agreeing with the RPD.

[28] The other issue, which was the subject of argument at the hearing before the Court, is concerned with a new issue being identified by the RAD without giving an opportunity to the Applicant to be heard. Instead of considering further the various issues about the lack of credibility of the Applicant, the RAD said that for the purpose of its forward-looking risk analysis, it accepted the Applicant’s evidence about the issues with the herdsmen as being credible. The only question in that context is to determine if the so-called “prospective risk” constitutes a new issue.

[29] There is no doubt that the RAD identified the issue clearly at paragraph 13 of its decision; it elaborated on the reasons why the RPD was correct: “I find that, while brief, the RPD’s

reasons regarding the issue of prospective risk are clear and the decision is correct" (RAD Decision, para 13).

[30] The Applicant relies on the Federal Court judgment in *Bouchra v Canada (Citizenship and Immigration)*, 2020 FC 1063 [*Bouchra*]. If the issue is the right to participate, as suggested by the Applicant, the standard of review is correctness (*Bouchra*, above, at para 16). The case law is clear and the Court does not disagree with the proposed standard of review.

[31] It remains that what needs to be considered is the threshold question of whether there is here a new issue. *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 [*Kwakwa*] provides a description that I accept of what constitutes a "new issue" at paragraphs 25 and 26:

> [25] In *Ching v Canada (Minister of Citizenship and Immigration)*, 2015 FC 725, the Court concluded that, when a new question and a new argument have been raised by the RAD in support of its decision, the opportunity must be given to the applicant to respond to them. In that case, the RAD had considered credibility conclusions which had not been raised by the applicant on appeal of the RPD decision. This amounted to a "new question" on which the RAD had the obligation to advise the parties and offer them the opportunity to make observations and provide submissions. Similarly, in *Ojarikre v Canada (Minister of Citizenship and Immigration)*, 2015 FC 896 at para 20 and *Jianzhu v Canada (Minister of Citizenship and Immigration)*, 2015 FC 551 at para 12, the RAD had raised in its decision questions which had not been reviewed or relied on by the RPD or advanced by the applicant. These situations can be distinguished from *Sary v Canada (Citizenship and Immigration)*, 2016 FC 178 at para 31, in which I found that the RAD did not examine any "new questions" but rather referred to evidence in the record which supported the conclusions reached by the RPD. A "new question" is a question which constitutes a new ground or reasoning on which a decision-maker relies, other than the grounds of appeal raised by the applicant, to support the valid or erroneous nature of the decision appealed from.

> [26] This is the case here. I conclude that, in reaching its decision, the RAD identified additional arguments and reasoning, going beyond the RPD decision subject to appeal, and yet did not afford Mr. Kwakwa with an opportunity to respond to them. More specifically, the RAD relied on arguments about the wording of Mr. Kwakwa's Congolese identity documents and asserted that there ought to be an address in the heading of the voter identity card and that a journalist card should not ask authorities to cooperate with the journalist. I find that the RAD made a number of additional comments regarding the documents submitted by Mr. Kwakwa in support of his Congolese identity, and that were not raised or addressed specifically by the RPD. It may be that these findings and arguments can effectively be supported by the evidence on the record, but I agree with Mr. Kwakwa that he should at least have been given an opportunity to respond to those arguments and statements made by the RAD before the decision was issued.
>
> [Emphasis added]

[32] As acknowledged by the Court in *Kwakwa*, "there is a fine (and sometimes blurred) line between situations where the RAD raises and deals with a "new question" and those where it simply makes reference to an additional piece of evidence on the record to support an already existing conclusion of the RPD on a factual assessment or on a credibility issue" (at para 30). The Court is confronted to that thin line in this case. In my view, there was no new issue in our case.

[33] I have carefully reviewed the reasons of the RPD and the RAD, as well as the written case presented by the Applicant to the RAD. There is no doubt that the forward-looking risk, the prospective risk, was a basis upon which the RPD decision was made. The RPD made its own conclusion and the Applicant appealed to the RAD from that part of RPD decision. In its written case before the RAD, the Applicant complained specifically about the findings of the RPD not being sufficient to support the conclusion "that the Fulani herdsman and the police no longer

have interest in the appellant" (para 25). Thus, the RAD was responding to the issue raised on appeal. Contrary to the decision in *Bouchra*, the issues articulated in this case are not more significant than those raised by the RPD: they are simply an articulation of what was found by the RPD. There is no new ground, as paragraphs 36 and 37 of the RPD decision speak loud and clear. There is no new reasoning either. The matter of the prospective risk was front and center as the Applicant raised the issue on appeal. This is not a case where "the RAD chooses to take a frolic and venture into the record to make further substantive findings, it should give some sort of notice to the parties and give them an opportunity to make submissions" (*Husian v Canada (Citizenship and Immigration)*, 2015 FC 684 at para 10).

[34] It seems to me that an apt analogy is with respect to the case of *Antunano Martinez v Canada (Citizenship and Immigration)*, 2019 FC 744. In that case, the credibility of the applicant was at the heart of the decision to be made; the RAD was found to certainly be allowed to conduct its own analysis. Furthermore, the RAD's analysis focused on what was already part of the record. The facts were those found by the RPD. That made our Court conclude that there was no procedural fairness infringement. Here, the prospective risk was evidently at the very heart of this case as the RPD had already found that there was no interest anymore in the Applicant, whether that be by the government (if there was ever any) or by the herdsmen, as an operator of a poultry farm which he had discontinued operating some time ago. In fact, the lease on the land farmed by the Applicant expired two years ago. There had been no threat by herdsmen whose interest according to the record is in the use of farmland. The Applicant complained, on appeal from the RPD decision, that paragraphs 36 and 37 were not clear enough why the panel believed

the police and the herdsmen had no interest in the Applicant, going forward. The RAD provided that clarity on the basis of the evidentiary record.

[35] In effect, the RAD was merely responding to the ground raised by the Applicant by providing its own analysis. In *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93, [2016] 4 FCR 157 [*Huruglica*] at para 103, the Court of Appeal concluded that "after carefully considering the RPD decision, the RAD carries out its own analysis of the record to determine whether, as submitted by the appellant, the RPD erred". That constitutes the safety net function wanted by Parliament so that the RAD "would catch all mistakes made by the RPD, be it on the law or the facts" (*Huruglica*, above, at para 98). I do not see how the RAD can be faulted for having addressed the ground of appeal raised by the Applicant and conducted the very analysis mandated by Parliament.

[36] In this case, there is no new ground of appeal as the matter was raised by the Applicant. There are not either new arguments as the RAD merely articulated the evidence already on the record to respond to the matter raised by the Applicant. There is no procedural fairness violation.

[37] The conclusion on the forward-looking risk was determinative of the appeal.

IV. Conclusion

[38] As a result, the judicial review application must be dismissed. The parties are in agreement that there is no question to be certified pursuant to section 74 of the Act. The Court concurs.

JUDGMENT in IMM-4030-21

THIS COURT'S JUDGMENT is:

1. The judicial review application is dismissed.

2. There is no serious question of general importance to be certified.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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