Federal Court  Cour fédérale

Date: 20220711

Docket: IMM-6081-20

Citation: 2022 FC 1016

Ottawa, Ontario, July 11, 2022

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

UYINMWEN IDEMUDIA
OLUWATENIOLA NOSAKHARE OLUSEYI-OKUNDIA (MINOR)

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision by the Refugee Appeal Division (RAD) made on October 30, 2020 (the Decision) confirming a decision by the Refugee Protection Division (RPD) that the Principal Applicant (PA), Uyinmwen Idemudia and her minor

son (MA), who are citizens of Nigeria, were neither Convention refugees nor persons in need of protection.

[2] The PA's spouse was found by the RPD and RAD to be a Convention refugee on the basis of his bisexuality. The PA and MA (together, the Applicants) were found not to have an objective basis for their subjective fear as family members of a bisexual man.

[3] For the reasons that follow, this application is granted. The RAD conducted a selective reading of the National Documentation Package (NDP), ignored relevant country condition evidence that supports the Applicants and did not address the threat of ritual cleansing.

II. **Background**

[4] In May 2018, while the Applicants and the PA's spouse were on a family trip in the United States, the sexual identity of the spouse was exposed and he feared arrest by the Nigerian police.

[5] The family travelled to New York and in October 2018, they crossed the border irregularly.

[6] Before the RPD, the family filed joint claims. The RPD accepted the husband's claim and granted him Convention refugee status but rejected the claim by the Applicants finding insufficient evidence to establish their risk.

III. **The Decision**

[7] The RPD and the RAD each found the Applicants were credible witnesses.

[8] The fear alleged by the Applicants is that they will be used by the Nigerian police as "bait" in order to arrest the PA's spouse.

[9] The RAD found the objective documentary evidence did not support the Applicants' fear of being at risk for being family members of a bisexual person.

[10] The RAD noted the objective evidence shows that spouses and children of sexual minorities can face stigma and embarrassment from community members and extended family. It added that the risk depends on whether the person in question is public about their sexuality, is an activist and whether the family members are openly in support of the person.

[11] The evidence before the RAD showed that the husband was never public about his bisexuality and it was revealed only after he left Nigeria.

[12] The RAD found there was no evidence that the PA was 'open' in her support of her husband. The evidence was that she only discovered his bisexuality after they left Nigeria.

[13] The RAD found the evidence indicated that the stigma that family members face is 'considerably reduced' once the person who is the sexual minority is no longer in Nigeria. Citing

a representative of a Non-Governmental Organization, the RAD stated the evidence went further, going on to indicate that family members do not face any risks from society or authorities when the person who is the sexual minority is no longer in Nigeria.

[14] The RAD noted that the RPD had found the PA established she and her son have a subjective fear of persecution in Nigeria, but what was missing is an objective basis for the fear.

[15] The RAD confirmed the decision of the RPD, agreeing that there was no objective basis for the subjective fears of the Applicants.

IV. **Issues and Standard of Review**

[16] The Applicants raise two issues: (1) whether the Decision was unreasonable because the RAD ignored vital evidence. (2) whether the procedural fairness rights of the Applicants were breached given the incomplete audio recording of the RPD hearing.

[17] As I have found the Decision was unreasonable, it is not necessary to address whether it was also procedurally unfair.

[18] The Supreme Court of Canada has established that when conducting judicial review of the merits of an administrative decision, other than a review related to a breach of natural justice and/or the duty of procedural fairness, the presumptive standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*]. While this presumption is rebuttable, none of the exceptions to the presumption are present here.

[19] *Vavilov* also confirmed, citing *New Brunswick (Board of Management) v Dunsmuir*, 2008 SCC 9 at paragraphs 47-48, that a reasonable decision is one that displays justification, transparency and intelligibility with a focus on the decision actually made, including the justification for it: *Vavilov* at para 15.

[20] Overall, a reasonable decision is one that is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker: *Vavilov* at para 85.

V. **Analysis**

A. *The Decision was not reasonable*

[21] The RAD found the only determinative issue was the objective basis of the Applicants' subjective fear.

[22] The RAD also found there was no reason to doubt the identity and credibility of the Applicants. Both the RPD and the RAD determined that the PA's husband is a bisexual man with a well-founded fear of persecution in Nigeria.

[23] The RPD found the PA and her husband, the principal claimant before the RPD, "to be credible witnesses" and said it "believes what they have alleged in support of their claims."

[24] The Applicants have challenged the reasonableness of the decision based on the RAD's failure to consider relevant evidence addressing the risk of ritual cleansing and the selective use of country condition documents addressing risk to family members of sexual minorities in Nigeria.

B. *Ritual Cleansing*

[25] The Applicants submit that the RPD and the RAD both erred by focussing exclusively on the risk that the Applicants would face at the hands of the police. In so doing, they overlooked the risk of being subjected to ritual cleansing by family members, in particular the PA's husband's uncle who is the Chief Priest of the village and is determined to 'cleanse' the Applicant's husband, and their son.

[26] The Applicants say the RPD and the RAD both overlooked vital evidence in the Basis of Claim form (BOC) in which the PA's husband stated at paragraphs 1, 7 and 14:

> 1. . . . I came to Canada because I was running for my life because I am bisexual. I would be sentenced to a 14 year jail term if the police had found me . . . and now my uncle wants to (*sic*)me to come to the village with my son for some barbaric rituals to cleans (*sic*) the community of my **"evil deed"** and going back to Nigeria will endanger my life, that of my wife and son. (emphasis in the original)
>
> 7. This news has also reached my uncle who is now head of the family since my father passed away. . .My uncle who happens to be a chief priest of the family shrine (orumila) said he is not going to close his eyes to allow this (*sic*) pass by that unless I report to the village of User with my son to perform the rituals of cleansing. My mom knowing of these rituals told me that they are deadly and if I refuse it will lead to "jungle justice "that is, we would be mobbed by the villagers and taken to the market place where we would be burnt, my son and I. (quotation marks in the original)

> 14. The suffering was too much, now that my family know I am bisexual and I will most likely face a 14 yrs jail term, and my uncle is after I and my son to come perform some rituals. . .

[27] A letter from the mother of the PA's husband supports those statements in the BOC.

[28] The letter outlined there had been a series of family meetings about the husband's homosexuality and that he brought shame, calamity and disgrace to the community. Because of that, other family members and the uncle said they needed to perform a ritual cleansing of the husband and his minor son.

[29] The mother's letter also stated that the police attended frequently at her apartment, ransacking it while looking for her son as they wanted to take him to court.

[30] The RAD failed to mention or address the risk to the minor child of being subjected to ritual cleansing because of his father's bisexuality.

[31] Remembering that the RPD found the PA and her husband "to be credible witnesses" and that it "believe[d] what they have alleged in support of their claims", I find the RAD's failure to mention this relevant and material risk was irrational and inconsistent with the evidence.

[32] When directly relevant evidence is not considered or analyzed by a decision-maker, the door is opened to an inference that the decision-maker made an erroneous finding of fact without regard to the evidence or ignored contradictory evidence: *Cezair v Canada (Citizenship and Immigration)*, 2018 FC 886 at para 27.

[33] I find the RAD made an erroneous finding of fact without regard to the evidence when it determined the MA would not be at risk if he was returned to Nigeria. This error renders the Decision unreasonable as it applies to the MA.

C. *Selective use of the NDP*

[34] The PA argues that the RAD erred in making selective use of the documentary evidence as it relates to the plight of family members of persons accused of committing criminal offences in Nigeria.

[35] The RAD cites the NDP for Nigeria, November 29, 2019, tab 6.11, "The Situation of Sexual and Gender Minorities in Nigeria (2014-2018).Immigration and Refugee Board (IRB) of Canada. February 2019", at pages 19 and 20, as the source for the statements made at paragraph 8 of the Decision which says:

> [8] A review of the objective evidence shows spouses and children of sexual minorities can face stigma and embarrassment from community members and extended family. However, the risk depends on whether the person who is the sexual minority is public about their sexuality, is an activist and whether the family members are openly in support of the person. The evidence before me shows that the Principal Appellant's husband was never public about his bisexuality, it was revealed only after he left Nigeria. There is no evidence to suggest that the Principal Appellant was 'open' in her support of her husband, indeed she too only discovered his bisexuality after she had left Nigeria. The evidence further goes on to indicate that the stigma that family members face is 'considerably reduced' once the person who is a sexual minority is no longer in Nigeria, with a representative of one NGO indicating that family members do not face any risks from society or authorities when the person who is a sexual minority is no longer in Nigeria.

[36] The PA submits that the objective evidence did not support that the police would not come after the PA and MA. Rather, it suggests that family members of persons accused of crime and being sought by the police are often arrested.

[37] The RAD cites RIR NGA 105249.E, at page 263 as the source for the following statements made at paragraph 9 of the Decision:

> [9] The *Principal Appellant has not presented any evidence that, as she argues, it is highly probable that the Nigerian police will arrest her to produce her husband*. On the contrary, the objective evidence shows that she has a minimal probability of being sought by the police in Nigeria. The Principal Appellant argues that it is a well-known practice of the Nigerian police to go after persons whose partners are being sought after and demand that they produce their partner, *but no evidence was presented to support this assertion*. The documentary evidence shows that even amongst organizations that promote and protect the rights of sexual minorities, there was scant evidence of family members being arrested. (my emphasis)

[38] The RAD failed to consider other objective country condition documents that support the PA's contention that as a relative of a wanted person she is at risk of being detained and/or arrested:

> Sources indicate that the Nigerian police force have arrested and detained relatives of wanted persons (NOPRIN 26 July 2015; International Business Times 1 Nov. 2014; The Guardian 6 May 2014). Other sources further report that this act is often undertaken with the intent of drawing a wanted person from hiding and forcing their surrender to law enforcement authorities (TIERs 29 July 2015; CLEEN 24 July 2015). In correspondence with the Research Directorate, the National Coordinator of the Network on Police Reform in Nigeria (NOPRIN), a coalition of 46 Nigerian civil society organizations committed to promoting police accountability and respect for human rights (NOPRIN n.d.), stated that NOPRIN is aware of "many" cases in which the Nigerian police detained both family members and friends of wanted persons…: RIR NGA105249.E.

> According to the National Coordinator of NOPRIN, there is no "category of offences for which the police detain family members or friends of wanted persons. The police in Nigeria arbitrarily arrest people for any real or imagined offence at the slightest excuse" (NOPRIN 26 July 2015). . . .: RIR NGA105249.E.
>
> Sources explain that these may happen when the police cannot find a suspect: they may then arrest a family member or friend instead of the suspect (CLEEN 8 Nov. 2019; Executive Director of RULAAC 28 Oct. 2019). The purpose of this is to use the person as enticement to convince the suspect to come forward (Executive Director of RULAAC 28 Oct. 2019; Waziri-Azi Dec. 2017, 115). In a telephone interview with the Research Directorate, the Executive Director of the Rule of Law and Accountability Advocacy Centre (RULAAC) [1] explained that "it is commonly known as 'hostage taking'. The police are trying to use the relative to draw out the person they are looking for. They may take a man's wife or children and keep them hostage until the man appears, or take a man as bait to draw out his wife" (Executive Director of RULAAC 28 Oct. 2019): RIR NGA106375.E.

[39] I find that the RAD selectively considered articles from the NDP. The above extracts clearly show that the RAD's finding that "there was no evidence was presented to support" the PA's assertion of her risk of being arrested is not supported by the objective evidence in the NDP.

VI. **Conclusion**

[40] For all of the foregoing reasons, this application is granted and the Decision is set aside.

[41] This matter is returned for redetermination by another member of the RAD.

[42] There is no serious question of general importance for certification.

JUDGMENT in IMM-6081-20

THIS COURT'S JUDGMENT is that:

1. The application is granted and the Decision is set aside. The matter is remitted for redeterimination by an other member of the RAD.

2. There is no serious question of general importance for certification.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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