

Federal Court



Cour fédérale

**Date: 20210630**

**Docket: IMM-883-20**

**Citation: 2021 FC 696**

**Ottawa, Ontario, June 30, 2021**

**PRESENT: The Honourable Mr. Justice Favel**

**BETWEEN:**

**CHARLES EBHODAGHE AGAZUMA  
EMMANUEL OMONKALO AGAZUMA (A MINOR)  
TREASURE IVIE AGAZUMA (A MINOR)  
MIRABEL OSEBWANHU AGAZUMA (A MINOR)  
RICHIES ERONMOME AGAZUMA (A MINOR)**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Nature of the Matter**

[1] The Applicant, Mr. Agazuma [Principal Applicant], and his minor children [collectively the Applicants] seek judicial review of the December 18, 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 dismissed the Applicants' appeal of a 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 Applicants seek an order setting aside the RAD's decision and declaring the Applicants Convention refugees or persons in need of protection. In the alternative, the Applicants seek an order setting aside the RAD's decision and referring the application back for reconsideration by a differently constituted panel of the RAD.

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

## II. Background

[4] The Applicants are all citizens of Nigeria. They allege a fear due to threats of danger by elders of the Principal Applicant's extended family who want his daughters to undergo female genital mutilation [FGM]. The threats occurred after each of the Principal Applicant's daughters were born over the course of the past ten years, with extended periods of inactivity in between. Further, the elders threatened the Applicants at their home in October 2017.

[5] The Applicants obtained United States [US] travel visas on January 23, 2018, and arrived in the US on March 27, 2018. They came to Canada three days later and claimed refugee protection. On August 7, 2019, the RPD denied the Applicants' claim.

### III. The RAD Decision

[6] The RAD rejected all five pieces of new evidence that the Applicants submitted. The RAD also upheld the RPD's negative credibility finding and held that the RPD was not required to conduct a separate analysis under section 97 of the *IRPA* once the section 96 analysis failed due to a lack of objective fear.

#### A. *Rejection of New Evidence*

[7] The RAD assessed the five pieces of new evidence submitted by the Applicants. The first three items were documents produced by the Applicants' former landlady including an affidavit, police reports, and three undated photos of deceased people. While the Applicants acknowledged that the three documents pre-dated the RPD decision, they argued only that they were not aware of them until after the negative decision. The RAD found that the Applicants did not provide sufficient submissions about how the evidence meets the criteria under section 110(4) of *IRPA* or how it was relevant and refused to admit them.

[8] The second item submitted were newspaper excerpts. The RAD found that the newspapers pre-dated the RPD decision and the Applicants made no submissions as to why it should accept them. The RAD held that the onus is on the Applicants to show how the criteria under section 110(4) of the *IRPA* are met and that it should not be left to the RAD to make assumptions about what part of a document is relevant and how. The RAD refused to admit them.

[9] The last item, a psychosocial assessment of the Principal Applicant, while dated after the RPD decision, the RAD doubted its newness as the information contained within it described symptoms that pre-dated the RPD decision. The RAD also found that the Applicants had made no submissions before it on the issue of relevance beyond a compelling reasons argument, which the RAD did not find applicable. The RAD refused to admit the report.

B. *Negative Credibility Finding*

[10] The RPD drew a negative credibility finding based on the lack of objective basis for a fear of persecution, the failure to mention the premature death of the Principal Applicant's sister in his Basis of Claim form (BOC), and the Applicants' delay in leaving Nigeria. The RAD found that the RPD had not erred in its credibility assessment.

[11] The RAD held that the Applicant had no objective basis for a fear based on a lack of objective evidence submitted. The RAD also found that given long periods of "relative quiet" from the asserted agents of persecution over a period of ten years it was not persuaded on a balance of probabilities that the village elders would escalate to forcible circumcision on a forward-looking basis.

[12] The RAD held that the Principal Applicant's failure to mention the premature death of his sister, which he believes was caused by deities at the behest of village elders, was not adequately explained. The RAD stated that even if it accepted the Applicants' explanation, the sister's death is evidence of the Applicants' subjective fear but does not present credible and trustworthy evidence of an objective fear.

[13] The RAD found that the RPD erred in its calculation of the length of the delay in leaving Nigeria but upheld the RPD's negative credibility finding based on the Applicants' unreasonable explanation for the delay. The Applicants received their US visas on January 23, 2018, but did not leave Nigeria until March 27, 2018. They state that this was to wait until the end of the school year to avoid suspicion that they were engaged in child trafficking. The RAD held that:

it is simply not reasonable that they would remain in a situation that they believed to be dangerous in Nigeria for several months, simply so they could travel out of Nigeria after the school year so as to avoid risking detention as suspected child traffickers for travelling with their own biological children.

[emphasis in original].

C. *Section 97 Analysis Unnecessary*

[14] The RAD found that the RPD was not required to conduct a separate analysis of the Applicants' claim under section 97 of the *IRPA*. This was because, "[t]he RPD's negative credibility findings and, more importantly in the RAD's view, its finding that the Appellants lack an objective basis for their fear dispose of both the section 96 and section 97 claims equally".

IV. Issues and Standard of Review

[15] The sole issue for determination is whether the Decision is reasonable. The Applicant points to the following three areas where the RAD erred:

- (1) The RAD's rejection of new evidence was unreasonable;
- (2) The RAD's negative credibility finding was unreasonable; and
- (3) The RAD's determination concerning section 97 was unreasonable?

[16] The Court is to start with a presumption of reasonableness when it reviews administrative decisions except where legislative intent or the rule of law suggests otherwise (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 16, 23). The issues in this case do not fall under any of these exceptions. The applicable standard of review for all issues in this judicial review is reasonableness. In applying the reasonableness standard, the Court must not assess the tribunal's reasons against a standard of perfection but ask if the decision under review is justifiable, transparent, and intelligent 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 reasonable?*

#### (1) Applicants' Position

[17] The Applicants submit that the RAD unreasonably rejected the new evidence and misrepresented their submissions. They claim that they made full and detailed submissions on the admission of new evidence and question the level of specificity required in submissions. They argue that the RAD should have adopted a flexible and generous approach.

#### (2) Respondent's position

[18] The Respondent argues that Rule 3(3)(g)(iii) of the *Refugee Appeal Division Rules*, SOR 2012/257, requires that the Applicants provide full and detailed submissions on the admission of new evidence. It states that the Applicants failed to provide necessary information and it was therefore reasonable for the RAD to reject the evidence.

B. *Was the RAD's negative credibility finding reasonable?*

(1) Applicants' Position

[19] The Applicants argue that the RAD erred in its analysis of subjective fear. They state that FGM is a cruel and barbaric practice and that for the RAD to reduce the issue to “the applicants' subjective beliefs on deities” was aimed to “unreasonably undercut the objectivity of the applicants' fear of persecution”. They state that the RAD fixated on a microscopic assessment of their subjective fear and the sister's death. This was unreasonable and undermined the Applicants' claims.

[20] The Applicants also argue that the RAD erred in stating that the Principal Applicant's wife is educated and applying the evidence contained in the National Documentation Package (NDP) on Nigeria, which states that parents who refuse FGM do not face consequences, particularly where they are educated. The Applicants further argue that the RAD's mind was negatively impacted by its erroneous belief that the wife was educated, rendering the RAD incapable of reaching a reasonable assessment.

[21] The Applicants argue that there was no delay in leaving Nigeria. They further argue the RAD panel cannot be seen to have accepted the applicants' argument on the error committed by the RPD on the one hand; and at the same time affirming the RPD impugned finding with a slightly strange variation. The Applicants say that where the RPD found that a three-month delay was excessive, the RAD cannot then find that a two-month delay was excessive. They also state

that the RAD ignored their explanation for waiting to leave Nigeria. The Applicants rely on *Ojogwu v Canada (Secretary of State)* (1995), 27 Imm LR (2d) 20 (Fed TD).

(2) Respondent's Position

[22] The Respondent reiterates the reasons given by the RAD for each of the three issues that contributed to its negative credibility finding, arguing that each determination was reasonable.

C. *Was the RAD's determination concerning section 97 reasonable?*

(1) Applicants' Position

[23] The Applicants argue that the RAD erred by determining that the RPD was not required to complete a section 97 analysis. They argue that an adverse credibility finding is not necessarily conclusive of a section 97 claim (*Odetoyinbo v Canada (Citizenship and Immigration)*, 2009 FC 501; *Asu v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1693).

(2) Respondent's Position

[24] The Respondent relies on *Ikeme v Canada (Minister of Citizenship and Immigration)*, 2018 FC 21 [*Ikeme*] to argue that a separate section 97 analysis was not necessary. The Respondent further argues that the negative credibility findings in this case go to the core of the Applicant's protection claim and sever any purported link between the documentary evidence concerning FGM and the Applicants' particularized risk, allowing the credibility finding here to affect the section 97 *IRPA* claim.



VI. Analysis

[25] When reviewing the Decision as a whole I find that is justifiable, transparent, and intelligent in relation to the relevant factual and legal constraints that bear on the decision (*Vavilov* at paras 91, 99).

A. *Was the RAD's rejection of the new evidence reasonable?*

[26] In *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*], the Federal Court of Appeal considered how to interpret section 110(4) *IRPA* and set out five questions the RAD should consider on the admissibility of new evidence. The issue in *Singh* was whether the implied conditions of admissibility identified in section 113(a) of *IRPA*, as considered in *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385 [*Raza*], applied to section 110(4). In confirming that they did, the Court in *Singh* confirmed the questions are whether the proposed evidence is: 1) credible; 2) relevant; 3) new; 4) material; and 5) subject to express statutory conditions.

[27] The Applicants have the onus to establish the satisfaction of the criteria on a balance of probabilities. They made no arguments before the RAD about the admissibility of the newspaper article. While the Applicants argue before this Court that their submissions on the admissibility of the landlady's evidence was intended to include the newspaper as well, it is not clear which articles the Applicants believe are relevant or how. It is also not clear why the newspaper was unavailable to the Applicants before the RPD decision. It was reasonable for the RAD to have found that the Applicants' RAD submissions were not full and detailed, as the Applicants did not

specify the evidence to which their arguments pertained. I find that the RAD reasonably refused to admit the newspaper articles.

[28] The Applicants also argue that, contrary to the RAD's finding, they did provide submissions on the psychosocial assessment report. Before the RAD, the Applicants submitted that the report met the requirements of section 110(4) since it postdates the RPD decision. They submit that it is credible because it is based on an expert's opinion and standardized psychological tests. However, they did not address the other admissibility factors.

[29] The RAD found that the report's newness was dubious. Even a document that is created after the RPD hearing can fail the newness requirement (*Raza* at para 16). The newness requirement in *Singh* states that the evidence must be capable of proving a circumstance that arose after the hearing in the RPD, proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or contradicting a finding of fact made by the RPD. Given that the symptoms complained of were not a circumstance that arose after the RPD hearing or a fact that was unknown to the Applicants at the time of the RPD hearing and does not contradict a finding by the RPD, I find that the RAD's determination to be reasonable.

[30] While the RAD determined that the document might relate to the Applicants' claim that there are compelling reasons not to return the Principal Applicant to Nigeria, it held that the compelling reasons exception was not available to the Applicants. The Applicants did not dispute this finding before this Court. Therefore, the relevance of the report was not clear. The RAD therefore reasonably rejected the report as new evidence.

[31] With respect to the documents produced by the Applicants' former landlady, the Applicants' submissions to the RAD did not explain how the documents met the section 110(4) criteria. The following is the entirety of the Applicants' submissions regarding the admissibility of this evidence:

55. The Appellant hereby presents new evidence which supports his fears that his family is determined to harm them because of their resistance to FGM. In their bid to search for the Appellant and his family, the agents of persecution have been harassing their former neighbors. Their landlady swore to an affidavit and made police reports about their visits. In March 2019, the police report indicated that the agents of persecution in their bid to find the Appellant and her family, ended up killing some of the residents. The reports are attached to this record, as well as photographs of the corpses. It is respectfully submitted that this occurrence proves conclusively that the agents of persecution have the means and the motivation to harm the Appellants if given a chance.

56. The evidence meets the test set out in section 110(4) because, although the evidence predates the negative decision of the RPD, the Appellant was not made aware of its evidence until after the negative decision was received. It is credible because it consists of sworn testimony and credible reports from the Nigerian police. It is submitted that if this evidence had been available before the decision of made, it would have changed the decision of the panel.

[32] While the Applicants explained that the landlady's evidence is credible since it includes sworn testimony and Nigerian police reports they make no submission on their source or context of their existence as required in *Singh*. The Applicants did not provide an explanation for how they came to be in the Applicants' possession.

[33] The Applicants also misrepresent the evidence by saying that it demonstrates the activities of their agents of persecution. In both the affidavit and the police reports, reference is made only to "some group of suspected people" who visited the Applicants' former home. The Applicants

provided no explanation of how they determined that it was the asserted agents of persecution or how undated photographs of unidentified corpses support their claims. 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). To be material it must have been capable of having an impact on the RAD’s overall assessment of the RPD’s decision (*Singh* at para 47). It is unclear how the evidence of unknown visitors at the Applicants’ former home and the deaths of innocent people can prove or disprove a fact related to the Applicants’ claim or could have an impact on the RAD’s assessment. It is therefore not clear how the evidence is relevant. The RAD reasonably rejected the evidence on this basis.

B. *Was the RAD’s negative credibility finding reasonable?*

[34] I agree with the Applicants that FGM is a cruel and barbaric practice; however, it is not the practice at issue before the RAD but rather an assessment of the objective basis for the Applicants’ fear. The RAD held that the Applicants had not established that the village elders would escalate to forcibly circumcising the minor female appellants on a forward-looking basis. The fear is not of the practice itself but of the consequences the Applicants believe will befall them if they refuse the practice. The Principal Applicant’s asserted fear was that his family elders would employ deities to cause him harm. In finding that there was no objective basis for this fear, the RAD relied on the evidence before it showing that the Applicants had been living in relative peace for ten years in Nigeria without any incidents of harm. This determination was reasonable.

[35] The RAD's conclusion that the parents would not face consequences for refusal to allow their daughters to undergo FGM did not rely on the Principal Applicant's wife's education. The only mention of her educational level is in the following sentence:

“Given that the Principal Appellant and his wife are educated and united in their refusal, on the basis of the country condition evidence and on the Appellants' evidence, the RAD is not persuaded that there is more than a mere possibility that the minor Appellants would be subject to forcible FGM against the wishes of their parents”.

The RAD found that the Principal Applicant had 16 years of education, which is above the Nigerian average. While the education level of the parents is relevant, it is not determinative. The NDP document 5.12 on FGM states that consequences of refusal are particularly non-existent where the parents are educated. This does not mean that there are consequences where one or both parent is less educated. The RAD considered the NDP evidence in conjunction with the facts of the Applicants' claim in reasonably determining that the Applicants had not established an objective basis for their fear.

[36] The RAD held that the Principal Applicant's did not adequately explain his failure to mention his sister's premature death in his BOC and that even if it accepted the explanation, the sister's death was evidence of the Applicants' subjective fear, not the objective basis for that fear. This was not a fixation on the sister's death and did not serve to undermine the Applicants' claim. The RAD did not find against the Applicants in this determination because of their metaphysical views. Rather, the RAD dealt with the sister's death to explain why it was not evidence of an objective basis for fear. This was reasonable.

[37] This Court's finding in *Ojogwu* established there might be times when delay in filing a refugee claim after arriving in Canada may be justified. This case is not relevant to whether it was reasonable for the Applicants to have remained at their home in Nigeria for two months after obtaining US visas. The RAD did not ignore the Applicants' explanation for the delay in leaving Nigeria. Rather, it considered their explanation and rejected it. The RAD held that it was not reasonable or credible for the Applicants to have waited two months if they believed they were in danger. The RAD's finding that the Applicants' delay in leaving Nigeria undermined their credibility was reasonable.

C. *Was the RAD's determination that a section 97 analysis was unnecessary reasonable?*

[38] While a section 96 claim requires both subjective and objective components of fear, a section 97 claim requires only objective risk. As a result, where a section 96 claim has been denied on the basis that the claimant has not established a subjective fear, the RPD is required to conduct a separate analysis for a section 97 claim based on objective risk. This is the principle supported by the cases cited by the Applicants. However, in the case at bar the RPD denied the section 96 claim on the basis that the claimants had not established an objective basis for their fear. Where there is no objective basis for fear of persecution, there is no objective risk.

[39] The following passages of my colleague Justice McDonald in *Ikeme* are illustrative of the interplay between section 96 and 97 of *IRPA*:

[39] This Court has held that the tests under s.96 and s.97 are distinct (*Ahmad v Canada (Minister of Citizenship and Immigration)*, 2004 FC 808 at para 21). For that reason, as noted in *Bouaouni v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1211 at para 41 [*Bouaouni*], negative credibility findings against an applicant under s.96 of the *IRPA* do

not necessarily mean that an applicant is not a person in need of protection under s.97. This is because s.97 of the IRPA primarily contains an objective assessment of risk, and so credibility is not necessarily determinative.

[40] However, a separate s.97 analysis does not always need to be done. The analysis of objective risk under s.97 must still be individualized (*Bouaouni*, at para 41), so that there is a connection between the general evidence and the applicant.

[40] I therefore accept the arguments of the Applicants that a negative credibility finding is not necessarily conclusive of a section 97 claim but find that the RAD's determination that no section 97 analysis was required due to there being no objective risk was reasonable on the evidence before it.

## VII. Conclusion

[41] The RAD reasonably rejected the new evidence presented on the basis that the Applicants had failed to provide sufficient information for the RAD to determine whether it met the criteria required for the admission of new evidence. The RAD's determination that a separate section 97 analysis was not required in this case was also reasonable. Finally, the RAD's determination that the Applicants had not sufficiently established an objective basis of fear was reasonable. The finding that the issues of objective fear, the death of the Principal Applicant's sister, and the delay in leaving Nigeria, negatively affected the credibility of the Applicants was also reasonable.

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

**JUDGMENT in IMM-883-20**

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

1. The application for judicial review is dismissed.
2. There is no question of general importance for certification.
3. There is no order for costs.

"Paul Favel"

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Judge



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

**DOCKET:** IMM-883-20

**STYLE OF CAUSE:** CHARLES EBHODAGHE AGAZUMA, EMMANUEL OMONKALO AGAZUMA (A MINOR), TREASURE IVIE AGAZUMA (A MINOR), MIRABEL OSEBWANHU AGAZUMA (A MINOR), RICHIES ERONMOME AGAZUMA (A MINOR) v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** HEARD BY VIDEOCONFERENCE BETWEEN OTTAWA, ONTARIO AND TORONTO, ONTARIO

**DATE OF HEARING:** FEBRUARY 1, 2021

**JUDGMENT AND REASONS:** FAVEL J.

**DATED:** JUNE 30, 2021

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