Federal Court  Cour fédérale

Date: 20230614

Docket: IMM-9157-21

Citation: 2023 FC 844

Ottawa, Ontario, June 14, 2023

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

JENAVIVE NDIDI NWANZE
ANNE EZINNE NWANZE
PHILLIP EMEKA NWANZE
LOUIS CHINONSO NWANZE
GERALD TOBECCHUKWU NWANZE

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 November 15, 2021, wherein the RAD found the Applicants did not establish an objective basis for their fear of persecution.

[2] For the reasons that follow, this application for judicial review is allowed.

II. **Background**

[3] The Applicants are a family of five from Nigeria who allege the traditional ruler of their town, the Obuzor of Ibusa (Obuzor), attempted to force their daughter into marriage. At the time, she was a minor and the Applicants refused the Obuzor's marriage attempts. The daughter is no longer a minor.

[4] On February 3, 2019, the Obuzor contacted the parents and informed them that he intended to make their daughter his second wife (CTR at pg 119). One week later the Obuzor sent an emissary to convey his intention to marry their daughter. The parents refused. On February 16, 2019, the council of elders summoned the parents for a meeting and again conveyed the Obuzor's intention to marry their daughter (CTR at pg 119). At this meeting, the council informed the parents that the Obuzor had scheduled the marriage to take place after Easter.

[5] The Applicants reported the Obuzor's intention to marry their underage daughter to the police on February 18, 2019, but the police informed them that it was not a police matter because the Obuzor is the authority in Ibusa and they cannot question his actions (CTR at pg 120).

[6] Fearing the consequences of refusing the Obuzor's marriage intentions, the Applicants fled to Canada, arriving on April 14, 2019 via a visitor visa.

[7] There is evidence in the record that shows, as of May 27, 2021, the Obuzor is still actively seeking out the daughter to marry her and offering a reward to anyone who can help him locate her and her family.

[8] On March 26, 2021, the Refugee Protection Division [RPD] heard the Applicants' claim for refugee protection and rejected their claim on April 26, 2021. The RPD found the family were not Convention refugees pursuant to section 96 of the *Immigration Refugee Protection Act*, SC 2001, c 27 [*IRPA*], nor persons in need of protection, per subsection 97(1) of *IRPA*. The RPD concluded there was an internal flight alternative in Benin City, Nigeria.

[9] The RPD accepted the central element of the Applicant's claim – that the Obuzor intended to marry the daughter – as true.

III. **Decision under Review**

[10] The RAD considered the Applicants' appeal from the RPD decision on November 15, 2021.

[11] On October 21, 2021, the RAD notified both the Applicants and the Minister that it would be considering, as a new issue on appeal, whether there was an objective basis for the Applicants' claims. The RAD invited both parties to provide submissions to it within 14 days. The parties did not provide submissions and as such the RAD decided the appeal without the parties' submissions (RAD decision at para 4).

[12] While the Applicants requested an oral hearing, the RAD declined to grant one because there were no serious issues with respect to credibility (RAD Decision at para 13).

[13] The RAD found that the RPD erred in concluding the Obuzor would not locate the Appellants in Benin City. However, despite the error, the RAD found it was not determinative because the Appellants did not establish an objective basis for their fear of persecution (at paras 15-16 RAD Decision).

[14] The RAD noted several points in support of its conclusion that the Applicants did not establish an objective basis for their fear of persecution. The RAD relied on the June 30, 2021 National Documentation Package for Nigeria, which explained that child marriage is less prevalent in southern Nigeria. The RAD found the PA responses to answers pertaining to consequences of disregarding the Obuzor's intent speculative. In addition, the RAD accepted that the Obuzor had powers of tradition and influence but it was insufficient to support a well-founded fear of persecution. Finally, the RAD did not find the Obuzor's desire to locate the Applicants and his offer of reward evidence of an intention to harm the Applicants.

A. *Admission of New Evidence*

[15] On appeal from the RPD, the Applicants asked the RAD to consider new evidence. The RAD considered subsection 110(4) of *IRPA* and admitted the following:

- affidavit of a friend in Benin City, sworn May 27, 2021; and
- documents from Humber River Hospital regarding the PA's husband's medical condition.

[16] The RAD declined to admit the parents' Ibusa Community Development Union Canada membership cards and undated photographs.

[17] The Applicants do not contest the RAD's admission of the new evidence nor its treatment of the evidence in this judicial review.

IV. **Issues and Standard of Review**

[18] Although the Applicant only raises one issue, there are two issues in this judicial review, which are as follows:

1. Can this Court consider the November 30, 2021 National Documentation Package?
2. Did the RAD err in finding the Applicants' fear is not well-founded?

[19] Both parties agree that the applicable standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII) [*Vavilov*].

[20] I note that the Applicant has attempted to provide new evidence on this judicial review in relation to a later-released National Documentation Package (NDP) that post-dates the RAD decision. The Applicant does not allege any procedural unfairness in relation to the RAD's consideration of the NDP. Instead, the Applicant relies on the NDP in support of its reasonableness arguments.

[21] Reasonableness is a robust form of review that ensures the decision is transparent, intelligible and justified (*Vavilov* at paras 13 and 15). A reasonable decision should be based on

an internally coherent and rational chain of analysis that is justified in relation to the constellation of law and facts that are relevant to the decision (*Vavilov* at para 105).

[22] The challenging party must show that any alleged flaws or shortcomings are more than superficial or peripheral to the merits of the decision: *Vavilov* at para 100.

V. **Analysis**

A. *The Applicant's cannot rely on the November 30, 2021 NDP Package*

[23] In their memorandum of argument, the Applicants rely on the November 30, 2021 NDP for Nigeria as objective evidence for their fear. Specifically, the Applicants refer to the following documents from the NDP Package:

- Item 5.7 Response to Information Request (RIR) NGA106371.E dated November 18, 2019;
- Item 12.3 RIR NGA200793.FE dated November 12, 2021;
- Item 12.2 RIR NGA200792.FE dated November 12, 2021;
- Item 10.8 RIR NGA105659.E dated November 14, 2016.

[24] The Respondent explains that the Applicants cannot rely on these materials from the November 30, 2021 NDP as it post-dates the RAD decision.

[25] In Reply, the Applicants submit that the NDP actually pre-dates the RAD decision. They argue that although the NDP became available on November 30, 2021, to the broader public, the

RAD and its members would have had access to the materials prior to the November 15, 2021 decision (Applicants Reply at para 4).

[26] In support of its position, the Applicant relies on *Zhang v Canada (MCI)*, 2015 FC 1031 [*Zhang*], which held the RAD should consider the most recent information when assessing risk on a forward-looking basis (at para 54).

[27] *Zhang* is not applicable to the facts here. The relevant question is whether the RAD had the new NDP available to it at the time it made its decision.

[28] This Court has no evidence before it that the RAD would have had access to the RIRs contained in the NDP before November 30, 2021. Therefore, the NDP post-dates the RAD decision and I am unable to find that the RAD should have considered the November 30, 2021, NDP and its contents.

[29] As the Respondent notes, judicial review of a federal board or tribunal should proceed only on the basis of evidence that was before the decision maker: *Lemiecha (Litigation Guardian of) v Canada (Minister of Employment & Immigration)*, [1993] FCJ No 1333, 1993 CarswellNat190 at para 4; *Osagie v Canada (Citizenship and Immigration)*, 2017 FC 635 at para 8. The Applicants cannot now seek to impugn the RAD's reasoning on evidence that was not before it.

[30] Accordingly, this Court is unable to consider the documents contained in the November 30, 2021 NDP. This finding does not apply to Item 5.7, which was contained in the previous June 30, 2021 NDP package and was explicitly cited by the RAD.

B. *Objective Fear of Persecution*

(1) The Family's Fear of Persecution

[31] The Applicants bore the burden of establishing the subjective and objective elements of their fear: *Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593, 1995 CanLII 71 at para 74.

[32] *Fodor v Canada (Citizenship and Immigration)*, 2020 FC 218 at paragraph 18, explains that the objective element requires claimants to establish, on a balance of probabilities, that there is a "reasonable chance", a "reasonable possibility", or a "serious possibility" of persecution based on a Convention ground if they were to return.

[33] The Applicants argue that the RAD's reasons are contradictory because it found the Applicants credible in their evidence but also there was a lack of objective evidence to support a well-founded fear of persecution. Therefore, the Applicants submit, that the RAD's reasoning is confusing and unintelligible.

[34] Evidence may be insufficient where it has little probative value, is uncorroborated, or lacks detail (*Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 at paras 26-28.

[35] Mr. Justice Grammond also reviewed sufficiency of evidence in *Magonza v Canada (Minister of Citizenship and Immigration)*, 2019 FC 14 [*Magonza*] at paragraphs 32-35. explained sufficiency as follows:

> [33] Another manner of conveying the concept of sufficiency is to require corroboration: evidence that stands alone may not be sufficient. Of course, there is no accepted manner of quantifying credibility, probative value and weight. Thus, it is impossible to describe in advance what "amount" of evidence is "sufficient." "Sufficiency" is simply a word used by decision-makers to say that they are not convinced.
>
> [Emphasis added]

[36] The Applicants' argue that if they are credible then their evidence is necessarily sufficient. In essence, because they are credible the RAD should have been convinced that there was an objective basis.

[37] This is incorrect. *Magonza* highlights at paragraph 34 that sufficiency of evidence is a "practical judgment made on a case-by-case basis". Sufficiency of evidence is an issue that attracts deference from reviewing courts: *Magonza* at para 35, citing *Perampalam v Canada (Minister of Citizenship and Immigration)*, 2018 FC 909 at paragraph 31.

[38] Given the foregoing, RAD and RPD members are entitled to find applicants credible but also find their evidence insufficient to establish the objective elements of a claim. That is the case here.

[39] The RAD viewed the NDP information, the story of the Obuzor burying someone alive for disobeying him, the Obuzor's political power and influence, the Applicants' concerns about

having their hair stripped, and the Obuzor's financial rewards as insufficient to establish an objective fear of persecution. It was entitled to view this evidence as insufficient.

[40] Finally, the RAD member assessed the Applicants' evidence and explained why it was insufficient in their view, as was required in the circumstances.

[41] However, I am not satisfied that the country condition evidence was adequately reconciled with the RAD's conclusions.

[42] Specifically, the Applicant points to NDP Item 5.7, which, under a heading titled "Consequences if Refusing a Forced Marriage and State Protection", states that consequences for refusal include "neglect and ostracism, physical violence and rape". While the RAD explicitly cites this document to support its finding that child marriage is prohibited by law, these consequences are never mentioned or acknowledged by the RAD in considering the objective evidence to support the Applicants' risk. The RAD's silence on this evidence is particularly problematic as it concerns the young daughter who is the target of the forced marriage.

[43] The RPD and RAD frequently deal with multiple claimants in a single decision (see *Refugee Protection Division Rules*, SOR/2012-256; *Murrizi v Canada (Citizenship and Immigration)*, 2016 FC 802 at para 7 [*Murrizi*]). This is especially so where the RPD joins claims of minors or secondary claimant to their mother or father's claim: *Ali v Canada (Citizenship and Immigration)*, 2015 FC 1061). However, it is clear that where one of the applicant's claims raises a distinct issue, it must be addressed separately: *Murrizi* at para 7;

Retnem v Canada (Minister of Employment and Immigration), [1991] FCJ No 428 (FCA), 1991 CarswellNat 53 at paras 5-6.

[44] In my view, the RPD and RAD failed to recognize that the daughter's claim raises separate and distinct considerations, including gender-based violence. Indeed, the evidence before the RAD was that she could face consequences such as ostracism, neglect, physical violence and rape for refusing the Obuzor's demand.

[45] The RAD found the Applicants' claim credible and accepted that they sought police help.

[46] The RAD member found there was insufficient objective documentary evidence to establish the family's objective fear that they face for refusing the marriage. However, much of the evidence may apply differently to the context of the daughter and therefore raises separate and distinct considerations.

[47] The evidence in the record is that the Obuzor is a powerful individual who has control over the legal system and political system, the police will not intervene in matters relating to the Obuzor, and the Obuzor is still actively seeking out the daughter for a forced marriage. The RAD accepted this evidence and accepted that the Applicants' fear adverse consequences for refusing the marriage.

[48] In light of the above, the RAD's conclusion that the Obuzor's desire to locate the Applicants and his offer of a reward to locate the daughter is insufficient evidence of an intention

to harm the daughter lacks both logic and transparency. At the very least, it is certainly evidence of a concerted effort to force a young woman into marriage by a powerful individual.

[49] The Board's June 30, 2021 NDP section 4.4.3 explains the consequences for refusal and associated problems of forced marriage. It outlines that a girl's refusal of a forced marriage could result in total neglect and ostracism. The NDP domestic violence section also notes that "most perpetrators of domestic violence are the person's current husband or partner" and that "rape is common and widespread".

[50] I find that failing to grapple with the personal consequences to the daughter, including the risks cited in the Board's NDP package, is an error which renders the Decision as a whole, unreasonable.

[51] The RAD failed to account for the daughter's individualized circumstances. Similarly to *Iduozee v Canada (Citizenship and Immigration)*, 2019 FC 38 at paragraph 31, although it is open for the RAD to rely on the documentary evidence to find that the daughter can try to refuse the marriage, the ability for the daughter to refuse is only a partial analysis of the prospective risk faced by her. To say that the daughter can refuse without consequences is unreasonable when there is evidence in the record that refusal is accompanied by consequences such as ostracism and neglect: *Iduozee* at para 31.

[52] In sum, the RAD ignored the evidence of risk from the forced marriage itself or the consequences that may flow from refusal, turning its mind only to the parent's risks associated

with refusal. The RAD failed to address the daughter's distinct risk of persecution separately from the family's claim, even though the evidence applies differently and raises separate considerations.

[53] A decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, such that the reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it: *Vavilov* at para 126.

[54] I am persuaded that the RAD failed to account for the evidence before it. Therefore, the Decision is unreasonable and cannot stand.

VI. **Conclusion**

[55] For the foregoing reasons, the application is granted.

[56] The decision is set aside and the matter will be returned to the Refugee Appeal Division for redetermination by a different member.

[57] No serious question of general importance was posed for certification, nor does one arise on these facts.

JUDGMENT IN IMM-9157-21

THIS COURT'S JUDGMENT is that:

1. The application for leave and judicial review is granted.
2. The decision is set aside and the matter shall be returned to the Refugee Appeal Division for redetermination by a different member.
3. There is no serious question of general importance to certify.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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