Federal Court Cour fédérale

Date: 20230622

Docket: IMM-4156-22

Citation: 2023 FC 877

Ottawa, Ontario, June 22, 2023

PRESENT: Madam Justice Walker

BETWEEN:

INNOCENT ODINAKA ONUKUBA
LIVINA EGOYIBO NWAGBARA
MITCHEL TOBENNA ONUKUBA
FAVOUR CHIZITERE ONUKUBA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants are a family of four from Nigeria. They seek judicial review of an April 7, 2022 decision of the Refugee Appeal Division (RAD) confirming the rejection of their refugee claim by the Refugee Protection Division (RPD). The RAD determined that (1) the Applicants had failed to establish they face persecution from the police in Nigeria; and (2) they

have viable internal flight alternatives (IFAs) in Nigeria that address their fear of forced female genital mutilation (FGM) on the minor daughters.

[2] For the reasons that follow, I find that the Applicants have not demonstrated that the RAD's assessment of the evidence or availability of one or more IFAs was unreasonable. I also find that the RAD reasonably and thoroughly addressed the Applicants' arguments of procedural errors and unfairness by the RPD. Accordingly, this application for judicial review is dismissed.

I. Background

[3] The Applicants are: Mr. Onukuba (Principal Applicant), his spouse, Ms. Nwagbara (Associate Applicant) and their two minor daughters, one of whom is a Nigerian citizen while the second is an American citizen. The RAD's conclusion that, as an American citizen, the second daughter does not face persecution in the United States is not contested.

[4] The Applicants' refugee claim has two distinct aspects. First, the Applicants allege that the minor daughters are at risk of FGM by the Principal Applicant's uncle. Second, they allege that they are being sought by the Nigerian police because they provided bail on two occasions for a family member who had been arrested on suspicion of homosexuality.

[5] The Principal Applicant left Nigeria in January 2018 for the United States. The Associate Applicant and the eldest daughter joined the Principal Applicant in the United States in March 2018, where the Associate Applicant gave birth to the younger minor daughter on April 12,

2018. The Associate Applicant and the minor Applicants returned to Nigeria on May 28, 2018 but returned to the US in July 2019.

[6] The RPD rejected the Applicants' claim for refugee protection on November 4, 2021. The RPD noted that it did not receive post-hearing documents notwithstanding counsel's request for permission to do so. The member then made a series of negative credibility findings that undermined the material facts surrounding the Applicants' fear of forced FGM by the purported agent of persecution; the identity of and their familial link to Fabian, the individual to whom the adult Applicants claim they had provided assistance; and the details of their two-year sojourn in the US. The RPD also concluded that, even if their evidence were credible, the Applicants have a viable IFA in Abuja, Ibadan or Port Harcourt, Nigeria.

[7] The Applicants appealed the RPD's decision to the RAD. The Applicants submitted that the RPD erred in its assessment of their testimony, either misapprehending the evidence or identifying insignificant issues, and breached their right to procedural fairness in three respects. The Applicants provided brief IFA submissions, stating that they would have to go into hiding in Nigeria to avoid being found and, therefore, would not be able to make a living. They would also have to renew their Nigerian driver's licenses thereby enabling the police to find them.

II. Decision under review

[8] There are three parts to the RAD's decision:

The RAD's assessment of the evidence regarding Fabian

[9] The RAD stated that, given the adult Applicants' purportedly close ties to Fabian and their alleged efforts to assist him, it was inconceivable that the Principal Applicant would not know if Fabian were 20 years old or in his mid-30s. This lack of knowledge fully undermined their evidence, added to which the Principal Applicant testified that Fabian was the son of his brother, Emeka, whereas his basis of claim (BOC) narrative suggests that Fabian is a different brother's son and the Associate Applicant referred to Fabian as her brother-in-law (i.e. the Principal Applicant's brother). Moreover, even if the Applicants had assisted Fabian when he was charged with homosexuality, the RPD was correct in concluding that the evidence does not support a finding that they would be wanted by the police. The Applicants had therefore failed to establish that they face persecution by the Nigerian police.

[10] The RAD concluded that "[g]iven the evidence before the RPD, this aspect of their claim was, more likely than not, a fabrication".

The RAD's IFA analysis

[11] The RAD shared some of the RPD's concerns about the Applicants' fear of forced FGM but did not assess this aspect of the refugee claim as it was satisfied that the RPD's IFA assessment was correct. As the Applicants had not established a well-founded fear of persecution at the hands of the Nigerian police, the RAD's IFA assessment concerned only the purported

threat from the Applicants' family, specifically the Principal Applicant's uncle. The RAD's IFA findings were:

1. The uncle is a farmer from a small village. There was no evidence before the RAD that he has any political power or influence or that he has the means to find the Applicants in the IFAs.

2. The fact that the uncle contacted the Applicants at the home of the Associate Applicant's sister did not mean he would be able to find them in a large city some distance away where they do not have family. In that instance, the uncle was able to find the Applicants because they were staying with a close family member.

3. The Applicants' argument that they would be unable to work in the IFA cities because they would have to remain in hiding was not persuasive in light of the fact that their agent of persecution would not be able to find them in those cities.

4. Although the Applicants' appeal memorandum made no reference to other concerns, the RAD noted that there was evidence the Applicants could integrate in the IFAs based on their language skills, work experience and education.

[12] The RAD concluded that the Applicants had failed to meet their onus of establishing that the proposed IFAs are not viable.

Procedural fairness analysis

[13] The RAD acknowledged that it was problematic that the RPD had not received and considered their post-hearing documents. The panel then emphasized that the documents related to the female Applicants' FGM status and stated that the FGM aspect of the refugee claim was addressed by the availability of an IFA. The documents would have had no impact on the IFA analysis of either the RPD or the RAD. As a result, the absence of the post-submission documents had no impact on the appeal.

[14] The use by the RPD member of swear words was recorded during a break in the hearing but the RAD determined that there was no evidence the comments were directed to the Applicants or their counsel. By way of contrast, the member was courteous and respectful during the hearing. The RAD concluded that the use of the words without any indication of underlying motivation did not give rise to an apprehension of bias or closed mind on the part of the member.

[15] Finally, the RAD found that the RPD did not commit a breach of procedural fairness by failing to canvass a psychological report at the hearing but then giving it no weight as persuasive evidence of the Associate Applicant's allegations of persecution. The report addressed past trauma suffered by the Associate Applicant and was not probative of the threat of FGM to the minor Applicants. It spoke generally about traumatic events and stressful situations that have caused mental health issues for the Associate Applicant.

III. Analysis

[16] The Applicants submit that the RAD unreasonably concluded that (1) they had not credibly established their fear of persecution by the Nigerian police and (2) they have a viable IFA in any of Abuja, Ibadan or Port Harcourt. The Applicants also submit that the RAD erred in determining that the RPD had not breached their right to procedural fairness.

[17] The issues raised by the Applicants are subject to review by the Court for reasonableness *(Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 23). Although the Applicants argue that the RAD's analysis of the RPD's alleged breaches of procedural fairness must be reviewed against the standard of correctness, I do not agree. The question of whether

there was a breach of procedural fairness before the RPD is one aspect of the merits of the RAD's decision and is subject to review for reasonableness (*Ahmad v Canada (Minister of Citizenship and Immigration)*, 2021 FC 214 at para 13). In contrast if, in an application for judicial review of a RAD decision, an applicant questions the fairness of the RAD's process, no standard of review is engaged and the Court reviews the process in a manner akin to correctness review that asks whether it was fair to the applicant having regard to all the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

1. The RAD's analysis of the Applicants' alleged fear of the police

[18] The Applicants submit that the RAD conducted a microscopic analysis of their evidence regarding Fabian and their fear of pursuit by the Nigerian police. They argue that Fabian's age and his relationship to them are minor matters and that the RAD ignored other corroborating evidence, including their BOC narrative and a letter from their Nigerian lawyer.

[19] I have reviewed each of the Applicants' arguments and find no reviewable error in the RAD's assessment of the evidence regarding Fabian. The Applicants' alleged fear of the Nigerian police rests solely on their interventions on Fabian's behalf following his arrests. Their close relationship with Fabian motivated their interventions but the evidence regarding Fabian's true relationship with the Applicants was inconsistent and contradictory. The Applicants' BOC narrative states that Fabian came to live with them in 2017 when he was 21 years old. He developed close ties with the family. They knew of his involvement with programs to promote HIV awareness and became aware of his sexual orientation. In contrast, the RAD noted that the Principal Applicant was unable to confirm at the hearing whether Fabian was in his early

twenties or mid-thirties. The RAD also highlighted the contradictory evidence of Fabian's relationship to the Principal Applicant. Fabian is variously described as the son of two of the Principal Applicant's brothers or as his own brother.

[20] In my opinion, the RAD reasonably focussed on obvious inconsistencies in the Applicants' evidence and testimony that were neither microscopic nor ancillary to the Applicant's narrative. Those inconsistencies suggest a lack of knowledge of an individual with whom they allegedly lived, and who they loved and supported at significant financial and personal risk. The RAD's analysis did not delve into peripheral elements of the Applicants' relationship with Fabian (*Paulo v Canada (Citizenship and Immigration)*, 2020 FC 990 at para 60). Its adverse credibility findings undermined important factual aspects of one of the two central elements of the refugee claim.

[21] The RAD also stated that the RPD had correctly found that the evidence did not support the Applicants' claim that they would be or were wanted by the police for assisting Fabian. The Applicants confirmed that they were not aware of any formal warrant issued for their arrest. A letter from their Nigerian lawyer speaks in general terms about the adult Applicants being arrested and "possibl[y] prosecuted" under Nigerian legislation prohibiting same-sex marriage. The letter does not support a claim that the adult Applicants are being sought by the police. The Applicants argue that the RAD erred in failing to address the letter but the RAD's decision must be assessed based on how the Applicants framed their appeal (*Kanawati v Canada (Citizenship and Immigration)*, 2020 FC 12 at para 23). They did not mention the letter in their appeal submissions and the letter provides little support for the Applicants' claim of police interest. It is

phrased in terms of the lawyer's belief of possible persecution. At most, the RAD's omission of any reference to the letter is an immaterial error that does not compromise the panel's reasoning or justification for its rejection of this aspect of the refugee claim.

[22] The Court owes deference to the RAD's credibility findings (*Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at para 42). Here, the RAD based its adverse credibility findings not on a microscopic examination but on an intelligible and transparent analysis that fully supports its conclusion that the Applicants' evidence regarding Fabian was not clear or convincing. These findings, coupled with the absence of evidence of any warrant or pursuit by the police, fully support the RAD's rejection of Applicants' alleged fear of persecution by the Nigerian police.

2. The RAD's IFA analysis

[23] The Applicants submit that the RAD's analysis of both prongs of the IFA test is unreasonably flawed. They argue primarily that the RAD erred in finding that the uncle does not have the means to locate them in the IFAs given he had already located them at the sister's home. The Applicants state that, if they cannot disclose their whereabouts to family members, they will be effectively living in hiding (*A.B. v Canada (Citizenship and Immigration)*, 2020 FC 915 at paras 20-22).

[24] The RAD's analysis of the means of the uncle to track them down is detailed and consistent with the evidence in the record. The uncle is a farmer in his 70s. The Applicants provided no evidence that he has any power or influence beyond his village, nor did they provide

evidence that he is connected to any individuals who have influence beyond the village. The Applicants submit that the uncle demonstrated his ability to locate them anywhere in Nigeria by finding the Associate Applicant at her sister's home. However, the RAD addressed this incident, stating that the Applicants' logic was faulty because the fact the uncle was able to find them when they stayed with a close family member does not mean he could find them in a city some distance away where they do not have family.

[25] The Applicants do not directly challenge the RAD's finding but argue that the finding means they must effectively hide their whereabouts from family members should they return to Nigeria (*Zamora Huerta v Canada (Minister of Citizenship and Immigration)*, 2008 FC 586; *Ali v Canada* (*Citizenship and Immigration*), 2020 FC 93 (*Ali*)).

[26] I do not find the Applicants' argument persuasive for two reasons. First, the argument that they would be forced to live in hiding assumes that the uncle has the means to locate them in the proposed IFAs, contrary to the RAD's finding. Second, the Applicants provided no evidence that the uncle has or would threaten their family members should they refuse to disclose the Applicants' whereabouts. The facts and evidence before the RAD differ markedly from those in *Ali*, where the Court found (at para 50) that the applicants would have to hide from family members should they be required to return to Pakistan "[g]iven the dangers posed by knowledge of their whereabouts, or even their return to Pakistan". There is no evidence in the present case that the uncle poses any threat to family members.

[27] The Applicants submit that their testimony is presumed true and should be accepted as evidence of the risk of persecution in the IFAs. The Applicants rely on the general principle set out in *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (CA) but the presumption of truthfulness of a refugee claimant's testimony is not absolute (*Ogbanna v Canada (Citizenship and Immigration)*, 2023 FC 234 at para 14). The Applicants conflate findings of fact based on the presumption that a refugee claimant's sworn testimony is true and the inferences or beliefs a claimant may draw from those facts. The Court recently addressed the scope of the presumption of truth in *Singh v Canada (Citizenship and Immigration)*, 2021 FC 1410:

> [16] ... [T]his presumption does not apply to inferences, conclusions a witness may draw from the facts, or speculation regarding future events. Likewise, it does not apply to fears that are not sufficiently substantiated by the objective evidence: *Araya Atencio v Canada (Minister of Citizenship and Immigration)*, 2006 FC 571 at paras 8–10; *Hernandez v Canada (Minister of Employment and Immigration)* (1994), 79 FTR 198 at para 6; *Derbas v Canada (Solicitor General)*, [1993] FCJ No 829 (TD) at para 3.

[28] In other words, while the Applicants may believe that the uncle could track them down, the evidence did not support such a finding and their belief in this eventuality does not overcome the absence of evidence (*Kassim v Canada (Citizenship and Immigration)*, 2018 FC 621 at paras 22-23).

[29] In summary, I find no reviewable error in the RAD's analysis of the first prong of the IFA test. The panel considered each of the Applicants' appeal submissions against the evidence, or lack of evidence, in the record. The RAD explained its reasons for finding that the Applicants

had not established a serious possibility of persecution or likelihood of harm in the IFAs and, in my view, its conclusion is justified on the evidence.

[30] Turning to the second prong of the IFA test, the Applicants submit that the RAD did not conduct a proper analysis of their personal situation and the cost of living, employment prospects, housing, access to social services and language differences in each of the IFAs. It simply confirmed the RPD's analysis. They state that the vagueness inherent in proposing three IFAs is sufficient for the decision to be found unreasonable in the absence of a discrete analysis of the living conditions in each proposed city.

[31] I do not agree. First, the Applicants' sole argument on appeal contesting the reasonableness of the IFAs was that they would have to live in hiding and could not obtain employment. The RAD addressed this argument in the decision. The panel stated that its finding that the uncle would not be able to find them in the IFAs confirms that they would not have to restrict their lives such that the adult Applicants could not find work. Second, the Applicants now raise a number of detailed arguments challenging the reasonableness of the IFAs. However, as the RAD stated, it was incumbent on the Applicants to make full and detailed appeal submission regarding any errors in the RPD's decision. They did not do so and it is not appropriate for them to impugn the RAD's decision in this application based on an issue and arguments they had not previously raised (*Dhillon v Canada (Citizenship and Immigration)*, 2015 FC 321 at paras 23-24; *Odekunle v Canada (Citizenship and Immigration)*, 2022 FC 786 at paras 31-32). The RAD commits no reviewable error in omitting to consider issues that were not before it, nor can issues in the RPD's decision that were not raised on appeal be used to

challenge a RAD decision (*Obalade v Canada (Citizenship and Immigration)*, 2021 FC 1030 at para 11).

[32] I find no error in the RAD's treatment of the second prong of the IFA test. In the absence of submissions from the Applicants, the panel confirmed that there was evidence the Applicants could integrate in the IFAs based on their language skills, work experience and education and consistent with the RPD's more detailed analysis. The Applicants' current arguments must be considered against that backdrop, as this proceeding is a review of the decision made by the RAD based on the record and submissions before it (*Xiao v Canada (Citizenship and Immigration)*, 2021 FC 386 at para 43).

3. Procedural fairness

[33] The Applicants first submit that the loss or misdirection of their post-hearing documents and the RPD's resulting failure to consider those documents was a breach of procedural fairness and that the RAD erred in concluding otherwise. They argue that the very fact the RPD did not consider the documents rendered the process unfair regardless of their content (*Hussain v Canada (Minister of Citizenship and Immigration)*, 2004 FC 259 at para 25 (*Hussain*)). The documents at issue are three brief doctor's letters that address whether each of the female Applicants has or has not been circumcised.

[34] I find no reviewable error in the RAD's analysis. The Applicants' argument places form over substance. The RAD committed no reviewable error in determining that the Applicants were not prejudiced by the misdirection of the post-hearing submissions. Their right to a fair

process in which the decision maker has considered all relevant evidence had not been breached. While in many, if not most cases, the fact that a decision maker did not consider a claimant's filed documents and submissions would be unfair, the same is not true in this case.

[35] The content of the post-hearing documents and submissions is relevant. In fact, it was critical to the RAD's conclusion. The RAD accepted for purposes of the appeal the Applicants' fear of forced FGM of the minor Applicants. The necessary implication of this acceptance is a recognition that the two girls had not been circumcised. The RPD member indicated that she accepted the Associate Applicant's testimony that she had undergone FGM and the RPD's IFA analysis similarly assumed that the minor Applicants had not previously suffered FGM. The RAD reviewed the appeal record, including the three letters, and was aware of the content of the post-closing submissions when making its decision. It did not assume or engage in speculation in this regard. In other words, the RAD could be certain that the Applicants' post closing documents and submissions would not have had any effect on the outcome of the case. The panel was able to assess the content of the letters against the issues on appeal and to correctly conclude that "as [the letters] relate to the FGM status of the female Appellants, their absence has no impact on this appeal". This is in marked contrast to the facts and documents in *Hussain* (at para 25) where the Court determined that it could not "say with any degree of certainty that the applicants' final submissions would not have had any effect on the outcome of the case".

[36] Second, the Applicants submit that the egregious foul language used by the RPD member during a break in the hearing supports an apprehension of bias against them and indicates a closed mind. They argue that the RAD was required to investigate the circumstances of the

language and unreasonably contented itself with a review of the transcript of the hearing and speculation as to the motivation for the member's language.

[37] The parties agree, as do I, that the swear words used by the RPD during a break have no place in a professional setting. However, the question before me is whether the RAD could reasonably conclude that the member's use of those words during a break, without context or apparent motivation, did not give rise to a reasonable apprehension of bias.

[38] I am not persuaded by the Applicants' argument that the RAD was required to investigate the circumstances surrounding the RPD's language. The RAD reviewed the recording and transcript of the hearing and emphasized that the words were spoken during a break. The RAD compared the language to the tone and words used by the RPD throughout the hearing and found that the member had been "courteous and respectful".

[39] The threshold for finding bias or a reasonable apprehension is bias is high as decision-makers are presumed to be impartial (*Sagkeeng First Nation v Canada (Attorney General)*, 2015 FC 1113 at para 105). As the Respondent notes, allegations of reasonable apprehension of bias must be supported by material evidence and cannot be based on mere suspicion or pure conjecture (*Obodo v Canada (Citizenship and Immigration)*, 2022 FC 1493 at para 65). The Applicants have not referred to any conduct or questioning in the hearing that would indicate to an informed person reviewing the matter practically that the RPD would not decide fairly (*Committee for Justice and Liberty et al. v National Energy Board et al.*, [1978] 1 SCR 369; *Ma v Canada (Citizenship and Immigration)*, 2019 FC 392 at para 26). They maintain

that the RPD's coarse language must indicate animosity toward them but, as the RAD stated, there was no evidence that the words were directed toward the Applicants or their counsel.

[40] Third, the Applicants submit that a psychological report that refers to trauma suffered by the Associate Applicant should have been considered as part of the evidence establishing her fear of FGM but I do not agree. The existence of the IFAs was determinative of the FGM aspect of the refugee claim. As the RAD stated, the report speaks generally of traumatic events that have affected the Associate Applicant. It is not probative of the means or motivation of the Principal Applicant's uncle to find the Applicants in the IFAs.

IV. Conclusion

[41] The application for judicial review is dismissed.

[42] No question for certification was proposed by the parties and none arises in this case.

JUDGMENT IN IMM-4156-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"Elizabeth Walker"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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