Federal Court Cour fédérale

Date: 20230405

Docket: IMM-7110-21

Citation: 2023 FC 478

Ottawa, Ontario, April 05, 2023

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

OLUFEMI JONATHAN ARIYIBI
AJIBOLA COMFORT ARIYIBI
OLUWASEREFUNMI TEMITAYO ARIYIBI
OLUWASETANFUNMI JONATHAN
ARIYIBI

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The Applicants seek judicial review of the October 4, 2021 decision of the Refugee Appeal Division [RAD] wherein the RAD upheld the decision of the Refugee Protection Division [RPD] that the Applicants are neither Convention refugees nor persons in need of

protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] [Decision]. The determinative issue for the RAD was an Internal Flight Alternative [IFA] in Abuja, Nigeria.

[2] The application for judicial review is dismissed.

II. Background

[3] The Applicants consist of the Principal Applicant [PA], Olufemi Jonathan Ariyibi, his spouse, Ajibola Comfort Ariyibi, and their two children. They are all citizens of Nigeria. The Applicants claim a fear of persecution by the Area Boys.

[4] In 2017, while employed as an assistant bank manager, the PA discovered that a loan to a company owned by Senator Bukola Saraki's family was in default. The PA brought this loan to the attention of his superiors. Several months later, the PA noted that this loan was deleted from the bank's records. The PA raised this with his superiors but they did not take any action.

[5] In May 2017, the PA began receiving threatening phone calls. In June 2017, the Area Boys detained him while in his car, warned him to keep quiet about the Senator, and demanded monthly payments. The PA reported these incidents to the police but they took no action.

[6] Later in June 2017, the Area Boys arrived at the PA's house armed. The PA paid them. The PA reported this event to the police, who were again disinterested. The PA paid the Area Boys again in July 2017, after which the PA resigned from the bank.

[7] In August 2017, the Applicants travelled to Canada. They first applied for different types of status, including student visas, for which various extensions were granted. In July 2018, the Applicants claimed refugee protection.

[8] Since their departure from Nigeria, the Applicants allege that the Area Boys have frequently contacted the PA's siblings and his spouse's family in order to locate them.

[9] On March 17, 2021, the RPD rejected the Applicants' claims. The determinative issue for the RPD was an IFA in Abuja or Port Harcourt. While the RPD accepted that the Applicants' evidence of the events was generally credible, the RPD had concerns regarding the delay in submitting their claims for protection. The RPD found that the Applicants had not adduced sufficient credible evidence to demonstrate that the Area Boys had the motivation or the means to track them to the proposed IFAs. The RPD noted that the Area Boys operate in southwestern Nigeria, away from the proposed IFAs. As a result, the RPD concluded that the Applicants were neither Convention refugees nor persons in need of protection. The Applicants appealed to the RAD.

III. The Decision

[10] The RAD upheld the RPD's decision that the Applicants were neither Convention refugees nor persons in need of protection. The determinative issue for the RAD was the IFA in Abuja.

[11] The Applicants submitted new evidence before the RAD outlining various altercations between the Area Boys and the Applicants' family members. While the RAD itemized 18 pieces of new documents, they can be summarized as follows:

1. A letter dated April 16, 2021 from the PA's brother describing an attack on April 8, 2021 and the corresponding medical and police reports;
2. A letter dated March 19, 2021 from the PA's sister describing an attack on March 17, 2021 and the corresponding medical report;
3. A letter dated March 31, 2021 from the spouse's mother describing an attack on March 29, 2021 and the corresponding affidavit and medical report; and
4. A letter dated March 30, 2021 from the spouse's nephew.

[12] The RAD found that the new evidence met the threshold for admissibility. However, the RAD assigned it little weight on the basis that the letters lacked reliability and credibility, noting some inconsistencies between the letters. The RAD found that their "timing and content" was "too fortuitous to be credible" and that it was implausible for such events to suddenly occur right after the RPD decision. The RAD also took issue with other evidence that was before the RPD, such as threatening letters provided by a tenant living in the Applicants' home and dated from 2017, 2018, and 2019.

[13] The RAD declined to hold an oral hearing. Not only did the new evidence not affect the Applicants' credibility, but it was also not central or determinative to the Decision. For the former reason alone, the requirements of subsection 110(6) of *IRPA* were not satisfied.

[14] The RAD proceeded to consider the Applicants claims under both sections 96 and 97 of *IRPA*. The RAD outlined the two-pronged test to find a viable IFA (*Rasaratanam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 at 711 (CA) [*Rasaratanam*]):

> 1. The Board must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the part of the country to which it finds an IFA exists and/or the claimant would not be personally subject to a risk to life or risk of cruel and unusual treatment or punishment or danger, believed on substantial grounds to exist, of torture in the IFA.
>
> 2. Moreover, the conditions in the part of the country considered to be an IFA must be such that it would not be unreasonable in all the circumstances, including those particular to the claim, for him to seek refuge there.

[15] The RAD determined that the Applicants failed to demonstrate that they do not have an IFA in Abuja. On the first prong, the RAD found that the evidence of the Area Boys' involvement with the Applicants' families after 2018 was vague. The RAD found it implausible that there would be a sudden escalation in violence in 2021, almost four years after the Applicants left Nigeria. Even if this evidence was credible, it only illustrated a local threat in Lagos. The RAD found that the Area Boys are not active in Abuja and there was no evidence that the Applicants would be forced to go into hiding in Abuja.

[16] On the second prong, the RAD found that, for the same reasons that there would not be a serious possibility of persecution, the Applicants did not provide sufficient evidence of undue hardship to relocate and live in Abuja. The RAD also considered the Applicants' ethnicity, religion, languages, work, and education backgrounds in finding insufficient evidence of barriers and challenges to constitute undue hardship.

IV. Issues and Standard of Review

[17] After considering the parties' submissions, the issues are best characterized as:

1. Was there a breach of procedural fairness?

2. Was the Decision reasonable?

[18] Neither party provides submissions on the appropriate standard of review for matters of procedural fairness. In my view, issues of procedural fairness are reviewed on a standard akin to correctness. As recently stated by this Court in *Ye v Canada (Citizenship and Immigration)*, 2021 FC 1025:

> [8] Questions of procedural fairness are reviewable on the standard of correctness (see *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; and *Mission Institution v Khela*, 2014 SCC 24 at para 79). Owing no deference to the administrative decision maker, the court must consider "whether the procedure was fair having regard to all the circumstances" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54-56).

[19] As for the second issue, I agree with the parties that the appropriate standard of review for the merits of the Decision is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). Reasonableness review is not a "line-by-line treasure hunt for error", and the decision must not be assessed against a standard of perfection (*Vavilov* at paras 91, 102). The decision need not "respond to every argument or line of possible analysis" or to "make an explicit finding on each constituent element, however

subordinate, leading to its final conclusion" (*Vavilov* at para 128). It is not for this Court to reweigh and reassess the evidence (*Vavilov* at para 125).

V. Analysis

A. Was there a breach of procedural fairness?

(1) Applicants' Position

[20] First, the RAD breached the Applicants' right to procedural fairness by making countless plausibility or credibility findings regarding the new evidence without giving the Applicants an opportunity to respond.

[21] Second, the RAD questioned the authenticity of the tenant's letters even though the RPD never made any adverse credibility findings on the same basis.

[22] Third, the new evidence corroborates the Applicants' claim that an IFA in Abuja is not viable. It establishes that the Area Boys will continue to target their family to locate them in Nigeria upon their return (*AB v Canada (Minister of Citizenship and Immigration)*, 2020 FC 915 at paras 20, 24).

[23] In summary, the RAD breached its duty of procedural fairness by not convening an oral hearing or, at a minimum, providing the Applicants with a procedural fairness letter outlining its concerns.

(2) Respondent's Position

[24] The RAD was not required to convene a hearing. The RAD's concerns stemmed from the credibility of the authors of the letters that were submitted as new evidence, rather than the credibility of the Applicants. The RAD was statutorily required to proceed without a hearing and assess the appeal based on the existing record. An oral hearing need only be convened where admitted new evidence gives rise to issues concerning an applicant's credibility (*Rehman v Canada (Minister of Citizenship and Immigration)*, 2022 FC 783 at para 41 [*Rehman*]).

[25] Contrary to the Applicants' submissions, the RAD's concerns with the new evidence were not "central to the decision" as they only affected the weight placed on the letters. Therefore, the RAD reasonably and fairly found that the statutory requirements for a hearing were not met (*Idugboe v Canada (Citizenship and Immigration),* 2020 FC 334 at paras 41-45 [*Idugboe*]).

[26] Even if credible, the new evidence would not have impacted the Decision, as the letters did not establish more than a localized threat.

(3) Conclusion

[27] Subsection 110(3) of *IRPA* observes that the RAD must consider appeals without an oral hearing. The exception to this general rule is found in section 110(6) of *IRPA*, which provides as follows:

> (6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)
>
> > (a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;
> >
> > (b) that is central to the decision with respect to the refugee protection claim; and
> >
> > (c) that, if accepted, would justify allowing or rejecting the refugee protection claim.

[28] As stated by the RAD in its Decision, the three components are cumulative. As a result, as soon as one component is not met, the RAD is not obliged to hold a hearing. In this case, the RAD did not find that the new evidence raised a serious issue with respect to the Applicants' credibility, nor did it find this new documentary evidence to be central to the decision (*Canada (Citizenship and Immigration) v Singh,* 2016 FCA 96 at para 44 [*Singh*]). Rather, the RAD found that "any issue with the content of the information [in the letters] are a reflection of the deponents and authors of the evidence."

[29] This Court has found that the RAD fairly declined to hold a hearing where "the credibility findings pertained to the authors of the documents and the contents of the evidence and did not relate, either directly or indirectly to the Idugboes who were the 'subject of the appeal'" (*Idugboe* at para 41).

[30] Further, in *Rehman*, Justice Strickland, citing Justice Ahmed in *AB v Canada (Citizenship and Immigration),* 2020 FC 61, reiterated when an oral hearing is required:

> [17] In view of the jurisprudence, the Applicants have advanced a misconstrued conception of the application of subsections 110(4) and 110(6) of the *IRPA*. The RAD is not required to hold an oral hearing to assess the credibility of new evidence — it is when otherwise credible and admitted evidence raises a serious issue with respect to the general credibility of the applicant that the determination of an oral hearing becomes relevant. A "credibility finding" on the admissibility of new evidence is not equivalent to a credibility assessment on the Applicants.

[31] An oral hearing need only be convened where "admitted new evidence gives rise to issues concerning the credibility of the applicant" (*Rehman* at para 41). There is no obligation to convene an oral hearing to assess the credibility of new evidence (*Abdulai v Canada (Citizenship and Immigration),* 2022 FC 173 at para 57).

[32] In the case at bar, the RAD was not obligated to conduct an oral hearing to assess the credibility of the new evidence as it did not raise a serious issue with respect to the credibility of the Applicants. Rather, this new evidence called into question the credibility of the third parties who authored the new evidence.

[33] As the RAD was entitled to conduct its own credibility analysis, it could question the authenticity of the tenant's letters even though they were found to be credible by the RPD (*Sanmugalingam v Canada (Citizenship and Immigration)*, 2016 FC 200 at paras 80-81). The RAD is normally required to proceed without a hearing and assess the appeal based on the existing record. Therefore, as mentioned above, the RAD did not have to give the Applicants the opportunity to respond to this credibility concern through a hearing or by way of letter.

[34] I also find that the RAD did not err in concluding that the new evidence did not corroborate the Applicants' claim that Abuja is not a viable IFA. The RAD found that this new evidence was not plausible because the timing was suspiciously convenient. The RAD was entitled to do so.

[35] As stated in *Jiang v Canada (Citizenship and Immigration),* 2021 FC 572 [*Jiang*]:

> [44] There were numerous inconsistencies between this evidence and other evidence. The RAD had good reason to be suspicious of the timing of the letter and the mother's account that a police officer was seeking out the Applicant two years after the events alleged in his refugee claim. <u>When the timing of events amount to an extraordinary coincidence that is suspiciously convenient, the RAD can reasonably regard such evidence as dubious</u> (*Meng v. Canada (Citizenship and Immigration),* 2015 FC 365 at para 22 [*Meng*]).
>
> [Emphasis added.]

[36] While adverse credibility determinations distinguish *Jiang* and *Meng* from this case, I find this jurisprudence relevant for the proposition that the RAD can regard the timing of evidence as dubious or convenient. The RAD did not commit an error in its approach to this aspect of the new evidence.

[37] In summary, there was no breach of procedural fairness.

B. *Was the Decision reasonable?*

(1) Applicants' Position

[38] It is difficult to comprehend why the RAD takes issue with the fact that the four letters together with the supporting documents all detail events occurring after the RPD's decision, given this is one of the preconditions for submitting new evidence to the RAD.

[39] Further, the RAD does not provide clear reasons for disregarding the documentary evidence. In finding that "there are issues regarding the plausibility that the agent of persecution would escalate the violence years after the Applicants left and when there was not a trigger for retaliation", the RAD speculated as to the *modus operandi* of the persecutor. The RAD is not allowed to enter into the minds of the Area Boys, nor is it allowed to make such findings without a proper explanation (*Imafidon v Canada (Citizenship and Immigration)*, 2011 FC 970 at para 11; *Qaddafi v Canada (Citizenship and Immigration)*, 2016 FC 629 at paras 76-77 [*Qaddafi*]).

[40] There is nothing to suggest that the Area Boys do not intend to follow through with their threats. The evidence suggests that after the Area Boys initially threated the PA in his car, they followed up with him and his family to collect monthly extortion payments. They continued to send threatening letters to the Applicants' home after their departure from Nigeria. Moreover, the new evidence demonstrates that they were also able to locate the Applicants' family members and physically assaulted them in order to ascertain the Applicants' whereabouts.

[41] Moreover, the manner in which the RAD assessed the letters from the PA's brother and mother-in-law is disconcerting. The RAD accepted that the attacks occurred, but did not believe that they were linked to the Applicants' persecution. Such disregard of the evidence is not justifiable, intelligible, or reasonable (*Vavilov* at para 96).

[42] The RAD also placed an inordinate emphasis on the fact that the medical report in relation to the PA's sister's injuries describes the agents of persecution as a "mob" rather than as "hoodlums", the term the PA used in his testimony.

(2) Respondent's Position

[43] The Applicants did not establish a forward-looking risk in Abuja. The RAD explained how, even if the new evidence was accepted at face value, the Applicants had not met their burden of demonstrating that the Area Boys would be able to track them to Abuja.

[44] The RAD's findings do not pertain to the implausibility of a particular narrative or perceptions of what constitutes "rational" behaviour. Rather, the RAD's concerns arise in part from the suspicious timing of the three attacks almost immediately after the RPD issued its decision. The RAD outlined inconsistencies with some of the new evidence and explained why the timing and circumstances raised plausibility concerns affecting their weight. The RAD reasonably considered these circumstances and this Court's jurisprudence in assessing the plausibility of the new letters (*Singh* at para 38).

[45] The RAD considered the Applicants' assertion that Mr. Saraki (the Area Boys' alleged political patron) and the Area Boys never lost interest in them, but concluded that this too was speculative and unsupported by current credible evidence. The RAD also considered the Area Boys' capacity to locate the Applicants, but found that they operated only in southwestern Nigeria, which is far from the proposed IFA.

(3) Conclusion

[46] The Federal Court of Appeal has established a two-pronged test in assessing whether there is a viable IFA. First, the Board must be satisfied, on a balance of probabilities, that there is no serious possibility of the claimant being persecuted or being subjected personally to a danger of torture, a risk to life or a risk of cruel and unusual treatment or punishment in the proposed IFA. Second, the conditions in the IFA must be such that it would not be unreasonable, in all the circumstances, including those particular to the claimant, for them to seek refuge there (*Rasaratnam* at 711; *Thirunavukkarasu* at 595-97). The burden of proof rests on the Applicants to demonstrate that they do not have a viable IFA.

[47] As noted above, the RAD found that the Applicants did not establish that there was a serious possibility of persecution for them in Abuja, nor did they show that it was unreasonable for them to seek refuge there. Only the first prong of the IFA test is in dispute.

[48] First, the RAD took issue with the fortuitous timing of the letters.

[49] In assessing the credibility of evidence, the RAD may consider "its source and the circumstances in which it came into existence" (*Singh* at para 38). Further, this Court has held in *Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 [*Lawani*] that the RAD is also entitled to draw implausibility findings in regard to that evidence:

> [26] Finally, the RPD is also entitled to draw conclusions concerning an applicant's credibility based on implausibility's, common sense and rationality. It can reject evidence if it is

> inconsistent with the probabilities affecting the case as a whole, or where inconsistencies are found in the evidence.

[50] The above principle also applies to the RAD's consideration of the timing and circumstances of the new evidence (*Jiang* at para 44).

[51] The RPD concluded the Applicants likely "would not be of ongoing interest to Mr. Saraki." Following the RPD's decision, the Applicants received four letters, one describing an attack on the date of the RPD's decision, and two describing attacks within the subsequent three weeks. The PA's brother's letter explained that, under the direction of Mr. Saraki, the Area Boys accosted him and asserted that "they have networks in all the states in Nigeria…already searching" for the Applicants.

[52] These letters are directly responsive to the RPD's concerns regarding the capacity and continued interest of the Area Boys to locate the Applicants in another part of Nigeria. As explained above in my consideration of the alleged breach of procedural fairness, the RAD reasonably considered "the circumstances in which these letters came into existence" when assessing the credibility of these new letters and found such evidence to be dubious. The RAD also clearly explained how the timing and content of the letters raised concerns affecting the weight of the evidence.

[53] In my view, the RAD made a reasonable plausibility determination with the evidence before it. As explained in *Valtchev v Canada (Minister of Citizenship and Immigration),* 2001 FCT 776:

[7] A tribunal may make adverse findings of credibility based on the implausibility of an applicant's story provided the inferences drawn can be reasonably said to exist. However, plausibility findings should be made only in the clearest of cases, i.e., if the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant. A tribunal must be careful when rendering a decision based on a lack of plausibility because refugee claimants come from diverse cultures, and actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant's milieu. [see L. Waldman, *Immigration Law and Practice* (Markham, ON: Butterworths, 1992) at 8.22]

[8] In *Leung v. Canada (Minister of Employment & Immigration)* (1994), 81 F.T.R. 303 (Fed. T.D.), Associate Chief Justice Jerome stated at page 307:

> [14] ...Nevertheless, the Board is under a very clear duty to justify its credibility findings with specific and clear reference to the evidence.
>
> [15] This duty becomes particularly important in cases such as this one where the Board has based its non-credibility finding on perceived "implausibilities" in the claimants' stories rather than on internal inconsistencies and contradictions in their narratives or their demeanour while testifying. **Findings of implausibility are inherently subjective assessments which are largely dependant on the individual Board member's perceptions of what constitutes rational behaviour. The appropriateness of a particular finding can therefore only be assessed if the Board's decision clearly identifies all of the facts which form the basis for their conclusions. The Board will therefore err when it fails to refer to relevant evidence which could potentially refute their conclusions of implausibility...**

[Emphasis in original.]

[54] The RAD considered the circumstances of the new evidence and “clearly identified all of the facts which form the basis for [its] conclusion” (*Leung v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 774, 81 FTR 303). Based on *Lawani,* the RAD also verified if there was evidence of any cultural differences that would lead to this escalation of violence before making its implausibility findings.

[55] For the RAD, it was obvious that the timing of the letters rendered the events implausible. The Applicants have not pointed the Court to relevant evidence that could potentially refute the RAD’s implausibility determinations. Accordingly, I see no reason to disturb its findings.

[56] Second, contrary to the Applicants’ submissions, the RAD does not speculate as to the *modus operandi* of the persecutor. The RAD simply held that there was no plausible reason for the attacks against the Applicants’ families to escalate suddenly after the RPD’s decision. Unlike *Qaddafi*, there is no credible evidence to “suggest that the agent of persecution does intend to follow through on that threat” (at para 77). The Area Boys might not have lost interest in the Applicants before 2018; however, after this date, the RAD found that the evidence was insufficiently credible to demonstrate an ongoing attack. For instance, the RAD found that the PA’s testimony regarding his brother’s interaction with the Area Boys was vague and did not amount to an ongoing threat. Since the Applicants did not meet their burden of proof, the RAD reasonably held that the persecutors were not motivated to seek the Applicants in Abuja.

[57] Third, the RAD considered all of the evidence before it, including the letters from the tenant in conducting an independent analysis (*Tekle v Canada (Citizenship and Immigration),* 2017 FC 1040 at para 30). However, the RAD questioned the authenticity of the letters due to the tenant's delay in sending them to the Applicants. The RAD was entitled to draw such conclusion (*Lawani* at para 26).

[58] Further, the RAD explained that even if it had accepted the new evidence as credible, it would not have changed the RAD's conclusion, as the evidence only demonstrated a localized threat to Lagos. The RAD also noted the violent incidents with the PA's brother and mother-in-law. However, the RAD found that there was insufficient credible evidence to conclude the attacks were linked to the Area Boys because of the PA's reporting to the bank. While the Area Boys might have claimed to have the capacity to find the Applicants in all of Nigeria, the RAD noted that this constituted hearsay evidence, and while admissible, it was less reliable. The RAD also explained that Lagos is approximately 200 km away from Abuja, and that since the Applicants had not disputed that the Area Boys are located in the southwestern Nigeria, the RAD found it unlikely that they would be active in Abuja. I am unable to find an error in this reasoning.

[59] Lastly, I agree with the Applicants that referring to the persecutor as a "mob" instead of "hoodlums" is not a significant difference. The Merriam-Webster dictionary defines a "hoodlum" as "a usually violent criminal" and a "mob" as "a criminal set: GANG". Both terms refer to criminality and I do not see how they are significantly different from one another.

Nevertheless, this distinction is not sufficiently central or significant to render the Decision unreasonable in light of the overall evidence (*Vavilov* at para 100).

[60] In summary, the RAD reasonably found that the Applicants did not establish that they would be at risk in Abuja.

VI. Conclusion

[61] The application for judicial review is dismissed. The Decision is justifiable, intelligible, and transparent.

[62] The parties have not proposed a question for certification and I agree that none arises.

JUDGMENT in IMM-7110-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Paul Favel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7110-21
STYLE OF CAUSE:	OLUFEMI JONATHAN ARIYIBI, AJIBOLA COMFORT ARIYIBI, OLUWASEREFUNMI TEMITAYO ARIYIBI, OLUWASETANFUNMI JONATHAN ARIYIBI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	OCTOBER 3, 2022
JUDGMENT AND REASONS:	FAVEL J.
DATED:	APRIL 5, 2023

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