

Federal Court



Cour fédérale

**Date: 20161220**

**Docket: IMM-4821-15**

**Citation: 2016 FC 1397**

**Ottawa, Ontario, December 20, 2016**

**PRESENT: The Honourable Madam Justice Elliott**

**BETWEEN:**

**ODEWIE IVORY UGBEKILE  
SMART EBOIGBE UGBEKILE  
CHUKWEMEKE EMMANUEL UGBEKILE (A MINOR)  
CHELSEA ENOREDIA UGBEKILE (A MINOR)  
BEVERLY ODEWIE UGBEKILE (A MINOR)**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. OVERVIEW**

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for judicial review of a redetermination of an appeal [Decision] made by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board

on October 9, 2015. The RAD dismissed the appeal by the Applicants of a decision by the Refugee Protection Division [RPD] that found the Applicants were not Convention refugees or persons in need of protection under section 96 and subsection 97(1) of the *IRPA* because there was a viable internal flight alternative [IFA] for them in Nigeria.

[2] The Applicants are a wife and her husband together with three of their minor children, all of whom are citizens of Nigeria. After the appeal, the wife gave birth in Canada to a fourth child. The Applicants fear persecution by the husband's father, other family members and the entire village in which they resided in Nigeria. They allege they have been targeted and threatened because, contrary to the express wishes of the husband's father, they refused to permit the circumcision of their eldest daughter.

[3] The RPD found that the Applicants are citizens of Nigeria. The Applicants appealed to the RAD on the basis that the RPD's finding of a viable IFA was erroneous. The Applicants alleged that the RPD focused only on the husband's father as the agent of persecution, whereas they feared the husband's siblings and in-laws as well as the villagers who support female circumcision. The RAD found the RPD had reasonably determined that the Applicants had not produced sufficient evidence to establish the influence and resources of the persecutors. The RAD also found no evidence was presented to the RPD that local villagers had participated in the persecution of the Applicants.

[4] The Applicants seek to set aside the Decision for two principal reasons. The primary reason is that the RAD made a negative credibility finding on a matter about which the RPD did not make any finding. The Applicants say it was procedurally unfair for the RAD to make that finding without providing them with an opportunity to address the concern. Also, the finding was

made in what the Applicants allege was a speculative manner. The other reason is that the RAD's finding that an IFA exists was unreasonable as it would have required the family to go into hiding and cut themselves off from their friends as well as their family.

[5] For the reasons that follow, this application is allowed.

## II. **ADDITIONAL BACKGROUND FACTS**

[6] The wife's narrative was made on behalf of the family and accompanied a Basis of Claim form [BOC]. She states that her husband's father is a well-respected man in their village because he is the oldest man and is the custodian of their culture and tradition. In October 2010, he went to the home of the Applicants and told the wife that her eldest daughter must be circumcised when she turned five years old. When he left she called her husband who rejected the idea and apparently told his father that the circumcision would happen "over his dead body". Thereafter, the husband's whole family turned against the couple. The husband was seen as a weak person. The father-in-law told the wife many times that she was "playing with fire" if she did not obey his instructions. Her husband's siblings also blamed the adult Applicants whenever misfortunes occurred in the village, saying the gods were angry because they had not circumcised their daughter.

[7] Shortly after the eldest daughter turned five years old, the wife's brother-in-law and sister-in-law went to her house and tried to forcibly take her daughter away to be circumcised. There was a loud altercation in which the wife was slapped in the face and pushed by her brother-in-law; she screamed and a neighbour was able to persuade the brother-in-law and sister-in-law to leave. As the husband was studying out of the country at the time, the wife and children moved to a friend's house where they stayed for two weeks. Eventually, the wife had to stop

going to work as she was being harassed there by the husband's family. On two occasions, strangers went to the children's school to ask after them. When the husband returned to Nigeria, the Applicants reported the original incident to the police. No action was taken by the police as they said it was a family matter that should be reconciled privately. When the wife later discovered she was pregnant she and her husband applied for a visa to the United States and left their home in Benin-City. They moved to Lagos to stay with the wife's uncle, where they remained until they travelled to the United States and, eventually, to Canada.

### III. **THE RPD DECISION**

[8] The RPD decision was rendered June 28, 2013. It found the determinative issue was that the Applicants had a viable IFA to Lagos or Abuja. In arriving at that determination, the RPD applied the two-pronged test set out in *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FCR 706 (CA), determining first that there was no serious possibility of the Applicants being persecuted in either Lagos or Abuja and then that it would not be unreasonable for the Applicants to seek refuge there.

[9] The RPD addressed the Applicant's claim that the husband's father would look for the Applicants anywhere in Nigeria. The wife had testified that he was popular and she believed he would find out they had re-entered Nigeria, would know where they are and would look for them. The husband testified that his father was very influential and would look for them anywhere. He said that after they moved to Lagos they had received threatening phone calls so they threw their phones away. The RPD found that there was no evidence that the husband's father was able to contact them after that. The panel said it was not persuaded that the father/father-in-law would have the ability or resources to locate the applicants in large urban

centres such as Lagos or Abuja. The conclusion was that it was not unreasonable for the applicants to seek refuge in either of those two cities.

#### IV. **THE FIRST RAD DECISION**

[10] The Applicants appealed the RPD decision to the RAD and received a decision dated September 25, 2013. On judicial review, Madam Justice Heneghan set this decision aside and sent the matter back for redetermination because the panel had applied the wrong standard of review. Relying on *Newton v Criminal Trial Lawyers' Association*, 2010 ABCA 399, the RAD applied a reasonableness standard of review to the RPD decision, which was a reviewable error.

[11] Because the RAD decision was sent back for redetermination on the basis of the standard of review applied, Madam Justice Heneghan did not review the decision on its merits.

#### V. **ANALYSIS OF THE RAD DECISION UNDER REVIEW**

##### A. *Standard of Review*

[12] In the Decision under review, the RAD applied the standard of review set out by Mr. Justice Phelan in *Huruglica v Canada (Citizenship and Immigration)*, 2014 FC 799. The panel determined that it would conduct its own assessment of the RPD's decision and come to an independent assessment of whether the Applicants were convention refugees or persons in need of protection. It would afford deference to the credibility findings of the RPD or to other findings where the RPD had a particular advantage in reaching its conclusions.

[13] When reviewing a decision of the RAD, the standard of review this Court applies is reasonableness: *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35.

For issues of procedural fairness, the standard of review is correctness: *Mission Institution v Khela*, 2014 SCC 24 at para 79.

[14] The reasonableness of a decision is determined by examining whether the decision-making process was justifiable, intelligible and transparent as well as whether the decision falls within the range of possible, acceptable outcomes defensible on the facts and law. When applying the correctness standard, the Court will not show deference to the decision maker's reasoning process: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47 and 50.

B. *The Applicants' Submissions to the RAD*

[15] The Applicants' submissions to the RAD only addressed the viability of the IFA, as the RPD found that issue determinative. The submissions alleged that the RPD failed to deal with documentary evidence and should have given consideration to the humanitarian and compassionate factors affecting the Applicants when assessing the reasonableness of the IFA. They submitted that the RPD erred when it concluded the Applicants would be safe in Lagos or Abujar, as in order to do so, they would need to be in hiding. They also submitted the RPD had failed to consider that other persons, such as the husband's siblings, had also been agents of persecution and there was no analysis of how likely it was that they might search for the Applicants.

[16] According to the Applicant's, the RPD had focussed exclusively on the husband's father. The Applicants challenged the statement by the RPD that the father would not have "the ability or the resources" to locate the family in a large urban centre saying the evidence was to the contrary as the father was influential in the village and that he had left his village to go to Benin City.

C. *The RAD's Process of Review*

[17] The RAD reviewed the criteria for establishing the existence of an IFA and considered the submissions about the ability of the husband's father to locate the Applicants or to influence others to locate them and persecute them. The RAD found there was no evidence that the father's influence extended beyond the village. It specifically found that there was also no evidence that villagers should be feared as no one other than the immediate family had been involved in threatening the Applicants.

[18] Importantly, the RAD reviewed the recording of the hearing. It noted that the husband said the family received telephone threats while they were in Lagos and subsequently threw their telephones away. The RPD had confronted the Applicants about omitting these threats from the BOC but made no finding in relation thereto. Nonetheless, the RAD at paragraph 23 of the Decision made the following finding about the wife's testimony on this matter:

The female Appellant paused for a long time and then explained that she did not know that she should have included everything that happened in her BoC. The RPD member did not make a finding on this omission in the Reasons; however, the RAD finds that the omission and the inadequate explanation for the omission undermined the allegations for the following reasons.

[19] The RAD then reviewed that the Applicants were represented by counsel when the BOC was written and, being threatened on several occasions in Lagos, approximately 250 km from Benin City, was a significant event that should have been included in the BOC. The resulting conclusion drawn by the RAD was that:

The RAD finds, on the basis of the foregoing, that the testimony related to the threats in Lagos was an embellishment at the hearing to support their allegations that they would not be safe in Lagos.

[20] The Applicants say it was procedurally unfair of the RAD to impugn the wife's credibility. Given that no finding in this regard was made by the RPD, the Applicants made no submissions to the RAD about credibility.

D. *The RAD Decision was made in a Procedurally Unfair Manner*

[21] I agree with the Applicants. The RPD had the advantage of seeing and hearing the wife give this testimony while the RAD only heard the audio recording. Had the RAD given the Applicants a chance to make submissions about the pause in her testimony it may have been that it was caused by a disturbance in the room or some other reason for the pause. The RPD, which had an advantage over the RAD on this matter, made no credibility finding after addressing this issue with the Applicants. The RAD's conclusion is purely speculative however it was used to support the conclusion that there was a viable IFA.

[22] In arriving at the credibility finding, the RAD failed to turn its mind to and apply the guidance provided by Madam Justice Kane in *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725. The RAD should have considered whether the credibility finding, made after listening to the audio of the hearing, was a new issue. If the RAD decided it was a new issue, it should have considered whether it was essential to address the finding in order to avoid an injustice. In that event the RAD should then have provided the Applicants with an opportunity to make submissions on the issue. By the RAD failing to go through this process and making a determination on an issue of credibility that was raised for the first time by the RAD, the Decision was procedurally unfair to the Applicants.

[23] As an aside, I note that the wording in paragraph 23 of the Decision is almost identical to the wording in paragraph 33 of the first RAD decision. There are minor differences between the



two versions, but the overwhelming similarities give me pause to wonder whether there was an independent assessment made of the wife's testimony. While this troubles me, the determinative issue is that the RAD did not allow the Applicants to address the credibility concern which arose for the first time at the RAD.

[24] Given this finding, it is not necessary to address the Applicants' allegation that the Decision was unreasonable as the IFA required the family to go into hiding because the persecutors were family members.

## VI. CONCLUSION

[25] The Decision by the RAD was procedurally unfair as it did not provide the Applicants with the right to make submissions about the wife's testimony. In addition, as stated by Mr. Justice Annis in *Ojarikre v Canada (Citizenship and Immigration)*, 2015 FC 896, since the Applicants were not aware that the wife's credibility would be an issue determined by the RAD, they were deprived of their statutory rights under subsection 110(4) of the *IRPA* to submit further evidence with respect to the issue.

[26] As a result, the application is allowed and the matter is remitted to another panel of the RAD for redetermination.

[27] Neither party suggested a serious question of general importance for certification nor does one arise in these circumstances.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application is allowed and the matter is remitted to another panel of the RAD for redetermination. There is no question for certification.

“E. Susan Elliott”

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Judge

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

**DOCKET:** IMM-4821-15

**STYLE OF CAUSE:** ODEWIE IVORY UGBEKILE ET AL v THE MINISTER  
OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** MAY 17, 2016

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**DATED:** DECEMBER 20, 2016

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