Federal Court  Cour fédérale

Date: 20170621

Docket: IMM-4641-16

Citation: 2017 FC 612

Ottawa, Ontario, June 21, 2017

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

RUKAYAT AJOKE OGUNDAIRO, ADEJUMUOBI NURATULAH OGUNDAIRO (MINOR), ADEDAMOLA MUHAMMED YASIR OGUNDAIRO (A.K.A. ADEDAMOLA MUHAMMEDYASIR OGUNDAIRO) (MINOR)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The present Application concerns the October 12, 2016 decision in which the Immigration and Refugee Board, Refugee Appeal Division (RAD) found that the Applicants, a mother (Applicant) and her two children, are neither Convention refugees nor persons in need of protection because an Internal Flight Alternative (IFA) exists in Nigeria, their country of origin.

[2] On appeal from the decision of the Immigration and Refugee Board, Refugee Protection Division (RPD), the RAD accepted the Applicant's evidence establishing her subjective and objective fear of more than a mere possibility of persecution pursuant to s. 96, and probability of risk pursuant to s. 97 of the *Immigration and Refugee Protection Act*, SC 2001 c 27, (*IRPA*) respectively, should she be required to return to Nigeria. The issue for determination is whether the RAD's IFA finding is supported by the evidentiary record.

I. The Undisputed Evidence Supporting the Applicants' Claim for Protection

[3] The Applicants seek protection from the family of the Mother's ex-husband (the in-laws). The RAD did not doubt the credibility of the Applicants' claims. Therefore, the following facts are uncontested, and, except as noted, are drawn from the Affidavit attached to the Applicants' Basis of Claim (Certified Tribunal Record (CTR), pp. 573-579).

[4] With the help of state security agents, the in-laws have pursued the Applicants for a number of years in order to subject the daughter to female genital mutilation (FGM) and both children to the infliction of tribal marks, collectively called "the rituals".

[5] The Applicant married her husband in 2003. Her daughter was born in 2003 and her son was born in 2006. During this time they lived with her husband in Lagos, whereas both spouses' families lived in Abeokuta, a city of approximately 1 million which is a 1.5-2 hour drive from Lagos (Transcript, CTR, pp. 458-459).

[6] In September 2006, the Applicant moved to Abeokuta with her children. In December 2006, the Applicant's mother-in-law began insisting that her children be subjected to the rituals. The Applicant was opposed to these practices and refused. The Applicant's husband travelled

from Lagos to Abeokuta and tried to reason with his family, to no avail. The Applicant and her husband decided that she and the children would move back to Lagos.

[7] In Lagos the Applicant's husband's sister visited their house every month to insist that the rituals be performed, and the husband received phone calls to this effect from the in-laws.

[8] In September 2010, the Applicant and the children moved back to Abeokuta because she was culturally required to care for her sick parents. The following month, the Applicant's husband fled the country after being found having sex with a man and, as a result, spending a week in prison. The in-laws were angry with the Applicant because of her husband's behaviour, seeing it as unacceptable. Their resolve to perform the rituals was strengthened.

[9] The Applicant was able to avoid her in-laws until December 2011 when she encountered her cousin-in-law by chance at her work. He subsequently sought her out to tell her that she needed to bring the children to have the rituals performed. The Applicant tried to dissuade her in-laws by having her Imam speak with them, to no avail. Her in-laws were further angered because the children were attending a Catholic school which, as Muslims, they opposed. They took the attendance as a sign that the Applicant was trying to convert the children to Christianity.

[10] The Applicant was robbed of her car and bag in January 2013 and when the police arrived, they realized who her husband was and wanted to question her on his escape from the country rather than the robbery. She convinced the police not to make a report, saying she would report the robbery later, but never did for fear of being arrested or questioned due to her husband's escape. The Applicant divorced her husband on May 27, 2014.

[11] On June 20, 2015, the Applicant's uncle-in-law went to her home, told her that the family could take custody of the children after seven years, and said the rituals would be carried out. Others were there as well, including men in Nigerian Security and Civil Defense Corps uniforms. The Applicant was beaten. The incident was witnessed by a neighbour, and the Applicant was able to yell to a friend to contact her parents.

[12] The Applicant and her children were taken to her in-laws' house, her daughter's pants and underwear were removed and an old man pulled out scissors. When the Applicant protested, she was slapped and threatened with death. The circumcision was about to begin when her parents arrived and disrupted it.

[13] The Applicant needed medical treatment. She did not go home, but when she later went to pick up some belongings, she saw that her home had been broken into. She went to stay with her parents.

[14] The Applicant was able to make arrangements to travel with her children to the USA in September 2015. They stayed with the cousin of the agent who had made the travel arrangements. The cousin was contacted by the Applicant's in-laws in December 2015, when they found out where the Applicant was. He told her to leave and she ended up staying with someone she had met at the cousin's home. That man raped her. She fled, and having nowhere to go, stayed at the bus station with her children, until she met a man who arranged for her to travel to Canada.

[15] It was only when she was staying at a Toronto shelter that she became aware that she could claim refugee protection and thereafter did so.

[16] The Applicant was five months pregnant from being raped at the time of the RPD hearing (Transcript, CTR, pp. 450-451). She has since given birth in Canada (Applicants' Further Memorandum, para. 21).

II. The IFA Finding

[17] The following description of the test for establishing the existence of an IFA is not contested (see: *Thirunavukkarasu v Canada (Minister of Employment and Immigration)* [1994] 1 FCR 589 (*Thirunavukkarasu*).

[18] An IFA is part and parcel of the definition of a Convention refugee. Refugee claimants bear the burden of establishing that they have a well-founded fear of persecution in their country of origin, such that they must seek protection from the international community. Natural justice requires that the decision-maker of a refugee claim alert the claimant if it appears that state protection may be available somewhere in the country of origin. The claimant must then address this concern in order to establish the claim.

[19] To find an IFA, the decision-maker must be satisfied on a balance of probabilities that it is viable and reasonable. That is, there is no serious possibility that the claimant will be persecuted in the IFA, and in all the circumstances, it is objectively reasonable for the claimant to seek protection there. Given that both prongs of the test must be satisfied, the claimant may disprove the allegation that an IFA exists by rebutting either prong. Claimants may have to rely on country condition evidence to disprove IFA viability because often they have never been to the proposed IFA. The reasonableness requirement must be interpreted flexibly, with sensitivity

to the particular circumstances of the claimant. In *Thirunavukkarasu* at page 8, Justice Linden gave the following direction:

> ...the question to be answered is, would it be unduly harsh to expect this person, who is being persecuted in one part of his country, to move to another less hostile part of the country before seeking refugee status abroad?
>
> [Emphasis added]

[20] In the present case, the RAD sought to establish the viability of Abuja as an IFA:

> The Appellant was asked if she could live in the capital city of Abuja, which she acknowledged was approximately 10-12 hours away from where she had been living in Abeokuta. She responded that her in-laws are well-known people and therefore capable of locating her. In response to her counsel, the Appellant stated that the perpetrators would find her through her surname, as she didn't change her name, and also through her place of work
>
> (Decision, para. 25).

[21] The RAD concluded that the Applicant had failed to establish that she would be "tracked down or targeted in Abuja" (Decision, para. 40). I find it is unnecessary to address the RAD's conclusion on viability because of the RAD's erroneous finding on the reasonableness of the IFA.

III. Reasonableness: The Evidence and the RAD's Finding

[22] The RAD was required by binding FCA jurisprudence (*Thirunavukkarasu*, *supra*) and the Immigration and Refugee Board's own *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution (Gender Guidelines)* to sensitively consider how the

Applicant's identity impacted the reasonableness of Abuja as an IFA (see: Applicants' Further Memorandum, para. 20; Decision, para. 20). The *Gender Guidelines* specify as follows:

> In determining the reasonableness of an IFA, the decision-makers should take into account factors including religious, economic, and cultural factors, and consider whether and how these factors affect women in the IFA.
>
> [Emphasis added]

[23] The Applicant's testimony is part of the record which the RAD was required to consider:

> Applicant: You know how it is when religiously and traditionally you come back with a pregnancy that you cannot account for in the sense that I have been divorced for a while, while I left Nigeria I wasn't pregnant. For me to go back with a pregnancy would be frowned upon by my religious community because it is considered an abomination to be pregnant without having a husband in both countries.
>
> Counsel: How do you think your family would react?
>
> Applicant: My father would be very very very annoyed with me. That why I do not know how to tell him.
>
> Counsel: Would there be any danger to you to go back pregnant or with a child as an unmarried woman. Would there be any danger to you or your child?
>
> Applicant: Yes...I would be disowned and ostracized.
>
> Counsel: Do you fear any harm to you or your baby if you go back to Nigeria? And who do you fear would cause you that harm?
>
> Applicant: They would stone me and my family would disown me.
>
> Counsel: You said something about stoning, who would you be fearful would do it to you?
>
> Applicant: The community […]
>
> RPD Member: But that happens only in certain parts of Nigeria, it does not happen in the areas of Abuja or Lagos.

> Applicant: It's everywhere.
>
> […]
>
> Counsel: So would Lagos be a safer place for you if you were to go back pregnant or with a child?
>
> Applicant: No, no it's still the same thing, no; it's the law, with Sharia law, being a Muslim, yes, I would be despised, I would be banished from the community.
>
> (Transcript, CTR, pp. 471-472)

[24] The RAD's entire reasoning on the reasonableness of the chosen IFA is as follows:

> [41] A report from the United Kingdom (UK) Home Office, June 9, 2015, states that Nigeria is a large country with a population of over 170 million, covering an area of over 900,000 square kilometres in 36 states. Nigerians can freely travel within Nigeria. The same report states that the 1999 Nigerian constitution provides for the freedom of movement within Nigeria, and states that every citizen of Nigeria is entitled to move freely throughout Nigeria and to reside in any part thereof, and no citizen of Nigeria shall be expelled from Nigeria or refused entry thereto or exit therefrom.
>
> [42] The Appellant argues that even if the RPD accepts that the Appellant was not raped, she has a child born out of wedlock, which it is submitted would in turn subject her to rejection in the community.
>
> [43] The RAD finds that the Appellant provided no persuasive evidence that she could not continue to receive support from her immediate family members. It is open to the Appellant to involve herself in a church where the RAD reasonably believes she could also find support in a religious community in Abuja. The RAD finds, on a balance of probabilities, that the Appellant could have moral and spiritual support in Abuja from her immediate family members.
>
> [44] The report from the UK Home Office, referred to above, indicates that in general it will not be unduly harsh for a woman, especially if single and without children to support, who is able to access accommodation and is able to support herself to relocate.
>
> [45] The Appellant's education is well beyond the average number of years or formal education completed by females which

> the independent documentary evidence indicates is nine years. The Appellant has been employed as a teacher for a number of years. The independent documentary evidence also indicates that it is easier for women to live on their own without male support if they are educated, have a high social status and can use family connections, amongst other variables.
>
> [46] The RAD finds that the Appellant is unlikely to tell anyone that she was raped, at least anyone who would target her as a result. Secondly, since this occurred in the US and not in Nigeria, she would simply be returning with a child, and therefore, the issue of marriage ought not to come into play.
>
> [47] Lastly, the Appellant's argument that her husband's homosexuality places her in a more precarious position is rejected by the RAD. She has not been with him for six years, and they are divorced. Accordingly, the RAD finds that while this may account for his absence, it has little or no relevance to the merits of this claim.
>
> [48] Therefore, the RAD finds that it would not be unreasonable, in all circumstances, including those particular to the Appellant, for her to seek refuge in Abuja.
>
> [Emphasis added] [References omitted]

[25] In my opinion, each of the findings expressed in paragraphs 42 to 47 are unsupported by the evidence.

[26] In paragraph 42 of the decision, the RAD acknowledged the Applicant's argument based on her unrefuted evidence of the real life danger that she and the children would face if they are required to return to Nigeria. However, as described below, the RAD failed to acknowledge and apply the evidence.

[27] Regarding paragraph 43, the RAD failed to recognize that, by implication of the physical separation of the Applicant from her family, the Applicant and her children will not have meaningful practical support from her family to deal with the extreme challenges that they will

face. To find that moral and spiritual support will sustain the Applicant and the children is unfounded. The idea that the Applicant will receive support from "a church" is an indication that the RAD did not care enough about the facts to fully recognize that the Applicant is Muslim, and the implications that arise from this fact. The Applicant's evidence goes to establish that there is more than a mere possibility that her own religious community will be an agent of persecution. On the evidence, there is no other "religious community" upon which she can depend.

[28] Regarding paragraph 44, the RAD's reliance on a completely irrelevant opinion that a woman "if single and without children to support" can cope, indicates extraordinary neglect of the evidence.

[29] Regarding paragraph 45, the RAD's reliance on an opinion that an educated woman with high social status and family connections can live on her own in Abuja without male support, is irrelevant. The Applicant is a well-educated teacher; that is where the comparable ends.

[30] Regarding paragraph 46, the expectation that the Applicant will succeed in lying about her reality in order to protect herself, and the children, is remarkably harsh. Expecting the Applicant to hide her history of rape, which she cannot change, while simultaneously expecting her to be able to access the support she requires to survive in Abuja is, to say the least, unrealistic (see: *Atta Fosu v Canada (Citizenship and Immigration)*, 2008 FC 1135). The RAD's finding that, "the issue of marriage ought not to come into play" as she would "simply" be returning with a child, ignores the Applicant's unrefuted evidence, as stated in paragraph 23 above, that she would be stoned or ostracized if she returns with a child for whom she cannot account.

[31] Regarding paragraph 47, the fact that the RAD did not appreciate from the evidence on the record that homophobia is a reality in Nigeria, and the Applicant's realistic fear that, if the community would learn that her ex-husband is gay, she and the children would suffer greatly is further evidence of the failure of the RAD's decision-making (CTR, pp. 162-264).

[32] And, finally, regarding paragraph 48, in my opinion the RAD's finding that it would not be unreasonable for the Applicant to seek refuge in Abuja was made in a perverse manner being the RAD's propensity to not find on the basis of the evidence. To say the least, on the evidence it is clear that expecting the Applicant to flee to Abuja is "unduly harsh" (*Thirunavukkarasu*).

IV. A Fair and Just Result

[33] There is no question that the decision presently under review must be set aside. Given the evidence on the record before the RPD, if I had the authority to do so, I would have no hesitation in directing a verdict that, pursuant to s. 111(1)(b) of the *IRPA*, the RAD is to set aside the RPD determination and substitute a determination that the Applicants are Convention refugees. However, the following statement at paragraph 14 in the decision in *Canada (Minister of Human Resources Development) v Rafuse)*, 2002 FCA 31 cautions against doing so in the present case:

> While the directions that the Court may issue when setting aside a tribunal's decision include directions in the nature of a directed verdict, this is an exceptional power that should be exercised only in the clearest of circumstances: *Xie, supra*, at paragraph 18. Such will rarely be the case when the issue in dispute is essentially factual in nature (*Ali v. Canada (Minister of Employment and Immigration)*, [1994] 3 F.C. 73 (T.D.)), particularly when, as here, the tribunal has not made the relevant finding. [Emphasis added]

[34] Because, whether an IFA exists in Nigeria for the Applicant and the children that is not unduly harsh is a question of fact, it is for the RAD to decide on a redetermination.

[35] Specific directions to the RAD on what is required to be considered on the redetermination should aid in reaching a fair and just result.

JUDGMENT IN IMM-4641-16

THIS COURT'S JUDGMENT is that:

1. The decision under review is set aside and the matter is referred back to a differently constituted panel of the RAD for redetermination on the following directions:

    a. The redetermination is limited to the issue of whether, for the Applicant and the children, a reasonable IFA exists in Nigeria that is not unduly harsh.

    b. On the basis of the binding decision in *Thirunavukkarasu* and the *Gender Guidelines*, the redetermination be conducted according to a sensitive understanding of what the Applicant has been through in her life, and what she and the children can reasonably be expected to endure into the future.

    c. As established by the evidence placed before the RPD with respect to the Applicant's identity and risk, in reaching a finding on the issue, consider each of the following factors independently, and together as whole. The Applicant is a Muslim woman who: suffers from PTSD; is a single mother of two adolescent children, and one infant child conceived by rape; has no male support; no means of support; has divorced a gay man whose whereabouts are unknown; is fleeing to save her children from persistent family members who

> wish to mutilate the girl child's genitals and inflict tribal marks on the children; and who, because of her identity just described, fears more than a mere possibility of persecution upon return to the Muslim country of Nigeria where Sharia law is prevalent throughout the country.

2. There is no question to certify.

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4641-16
STYLE OF CAUSE:	RUKAYAT AJOKE OGUNDAIRO, ADEJUMUOBI NURATULAH OGUNDAIRO (MINOR), ADEDAMOLA MUHAMMED YASIR OGUNDAIRO (A.K.A. ADEDAMOLA MUHAMMEDYASIR OGUNDAIRO) (MINOR)v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 15, 2017
JUDGMENT AND REASONS:	CAMPBELL J.
DATED:	JUNE 21, 2017

APPEARANCES:

Maureen Silcoff	FOR THE APPLICANTS
Laoura Christodoulides	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Silcoff, Schacter Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT