

Federal Court



Cour fédérale

**Date: 20200519**

**Docket: IMM-1573-19**

**Citation: 2020 FC 630**

**Ottawa, Ontario, May 19, 2020**

**PRESENT: The Honourable Madam Justice Elliott**

**BETWEEN:**

**SUSAN OLAJUMOKE SALAKO  
RASAKI OWOLABI SALAKO  
PRAISE OLAMIPOSI SALAKO  
CHAMPION ABOLAJI SALAKO  
ISRAEL AGBOLAHAN SALAKO**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Overview**

[1] This is an application for judicial review of a negative decision made on February 15, 2019 by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board [IRB] in

which it found that the Applicants were not Convention refugees or persons in need of protection [Decision].

[2] For the reasons that follow, this application is granted.

## II. **Background Facts**

[3] The Applicants are citizens of Nigeria. The Principal Applicant, Susan Olajumoke Salako [Ms. Salako], sought refugee protection along with her husband and three children.

[4] Ms. Salako has HIV. She began receiving antiretroviral therapy in Nigeria in 2014.

[5] Ms. Salako was in a relationship with a same-sex partner since 2008. Ms. Salako alleges that in July 2016, a relative caught her in bed with her partner and sent neighbours after her. Ms. Salako escaped through a window and fled to a different town, where she attended the hospital and received treatment for the injuries sustained during her escape.

[6] In September 2016, Ms. Salako's husband was fired from his position as a pastor and expelled from the church because of Ms. Salako's same-sex relationship. Around this time, Ms. Salako went to live with her sister, as she no longer felt safe in her neighbourhood.

[7] Some months later, Ms. Salako's family members learned about her sexual orientation. They threatened to kidnap her daughter to subject the child to female genital mutilation [FGM].

[8] On July 28, 2017, the Applicants left Nigeria and travelled to the United States to stay with a friend. Soon after, the friend learned about “what happened in Nigeria” and asked the Applicants to leave. The Applicants entered Canada on August 18, 2017 and made their refugee claim on September 19, 2017.

A. *Refugee Protection Division*

[9] On October 24, 2018, the Refugee Protection Division [RPD] found that the Applicants were not Convention refugees or persons in need of protection. The RPD found that Ms. Salako was not bisexual on a balance of probabilities. The RPD gave little weight to support letters from LGBTQ organizations, as none of the letter-writers indicated whether or not they would evaluate the genuineness of a person’s sexual orientation, or whether they had a close relationship with Ms. Salako.

[10] The RPD found that the evidence was insufficient to overcome the negative credibility findings that were based on inconsistencies and implausibilities in Ms. Salako’s testimony.

[11] The RPD found that Ms. Salako’s daughter did not face a serious possibility of persecution because of FGM, as the country documentation shows that parents can refuse to have FGM performed on their daughters.

[12] The RPD also found that the Applicants had not previously experienced discrimination amounting to persecution because of Ms. Salako’s HIV status. The RPD found that any discrimination Ms. Salako may have faced did not result in persecution, because it did not

prevent her from receiving treatment for HIV in Nigeria. The RPD also drew a negative inference from the husband's testimony about the discrimination he and his children would experience because of Ms. Salako's HIV status, since these allegations were not included in the Basis of Claim form [BOC].

[13] The Applicants appealed the RPD decision to the RAD.

B. *Decision Under Review*

[14] The RAD identified three determinative issues: 1) credibility, including the credibility of Ms. Salako's sexual orientation, 2) whether the Applicants face a serious possibility of persecution in Nigeria due to Ms. Salako's HIV status, and 3) whether Ms. Salako's daughter faces a serious possibility of persecution in Nigeria due to FGM.

[15] The RAD reviewed the RPD hearing and considered the Chairperson's Guidelines on Gender Based Violence and on Sexual Orientation and Gender Identity.

(1) *Credibility*

[16] The RAD considered the Applicants' argument that the RPD failed to consider the psychological report when making negative credibility findings. The RAD found that the RPD did not err in failing to refer to the psychological report, since the RPD is not obligated to refer to every piece of evidence in its decisions. The RAD also found that the credibility problems identified by the RPD did not arise from Ms. Salako's psychological issues. The RAD found that Ms. Salako was "perfectly consistent and coherent in answering the questions" in the hearing,

and found that the credibility problems stem from “logic problems that cannot be explained away by the psychological report.”

[17] The RAD concurred with the RPD that Ms. Salako’s apparent lack of knowledge that homosexuality was not tolerated in Nigeria was not plausible, as there was a wealth of information about such intolerance. The RAD noted that Ms. Salako provided consistent, unconfused testimony on this point.

[18] The RAD found it concerning that Ms. Salako was only able to provide photos of her same-sex partner from a very specific time period, even though the friendship and relationship went on for twenty-five years. The RAD concluded that the production of the photos and the credibility issues it raised had nothing to do with Ms. Salako’s psychological issues.

[19] The RAD found that Ms. Salako gave vague and very general answers about her same-sex relationship, and that this lack of detail was concerning.

[20] The RAD found that the delay between when Ms. Salako’s relative discovered her with her same-sex partner and when the family found out that Ms. Salako was bisexual caused further credibility problems, considering that there were neighbourhood witnesses. The RAD also found the period of several months without incident before the Applicants left Nigeria caused credibility problems that could not be attributed to Ms. Salako’s psychological state.

[21] The RAD concluded that the RPD did not err in its assessment of Ms. Salako's evidence or its finding that Ms. Salako is not bisexual.

(2) Persecution due to HIV status

[22] The RAD considered the Applicants' argument that the RPD failed to consider the forward-looking test of whether Ms. Salako would face a serious possibility of persecution if she returned to Nigeria.

[23] The RAD noted that Ms. Salako became aware of her HIV status in August 2014 and had received treatment for three years before she left Nigeria.

[24] The RAD noted that it was aware of country condition documents in the National Documentation Package [NDP] and presented by the Applicants that described discrimination against HIV positive people in Nigeria. The RAD found that "this should indicate that the Principal [Applicant] would face a serious possibility of persecution there due to stigma."

[25] The RAD found that Ms. Salako consistently stated that she received treatment to manage her HIV, and that the only reference to ill-treatment because of her HIV status was the fear of her family kidnapping her children.

[26] The RAD noted that Ms. Salako lived with HIV in Nigeria for three years, receiving treatment and having no harm come to her children. The RAD found that the country information about stigma goes back to those times and has not changed. The RAD found there was no change

in circumstances that would prevent Ms. Salako from receiving treatment for HIV and living successfully in Nigeria in the future. Ms. Salako's allegation that her family discovered her sexual orientation could not be relied upon as a change in circumstances, because this allegation was already found not to be credible.

[27] The RAD found that the RPD failed to properly address whether Ms. Salako would face a forward-looking serious possibility of persecution due to her HIV status. However, after conducting its own analysis, the RAD found that Ms. Salako would not face a serious possibility of persecution due to her HIV status if she returned to Nigeria.

[28] The RAD also dismissed the husband's claim that he would face a serious possibility of persecution due to Ms. Salako's bisexuality and HIV status. As Ms. Salako was found not to be bisexual, and as she was found not to face a serious possibility of persecution due to her HIV status, both of the husband's claims must fail.

[29] The RAD found that, in light of the other credibility issues, it could give little weight to the letter showing that the husband was expelled from the church. The RAD found the letter was tainted and was provided simply to bolster the Applicants' claims.

(3) Persecution due to FGM

[30] The RAD agreed with the RPD's finding that the allegation about the family wanting to kidnap the children was not credible. The RAD agreed that the Applicants' testimony on this issue was not credible because of the other credibility issues already established. The RAD also

agreed that the affidavits from family members were worth little weight because they simply restated the Applicants' allegations.

[31] The RAD found the allegations about the family wanting to kidnap the children and wanting to conduct FGM on Ms. Salako's daughter were manufactured to bolster the Applicants' claim. The RAD agreed with the RPD that even if the threat from the family existed, the country condition evidence showed that both parents opposing the procedure was enough to prevent it from happening.

[32] The RAD stated that because Ms. Salako was not found to be bisexual, her sexual orientation did not elevate the risk to her daughter, as the Applicants alleged. The RAD concluded that Ms. Salako's daughter would not face a serious possibility of persecution.

[33] The RAD concluded that the RPD did not err in its overall credibility findings or its assessment of the documentary evidence. The RAD found that the RPD's one error was not fatal to its overall findings that the Applicants were not credible, that Ms. Salako is not bisexual, and that the Applicants are not Convention refugees or persons in need of protection.

### III. **Issues and Standard of Review**

[34] The Federal Court of Appeal has established that reasonableness is the standard of review to be applied by this Court to a decision of the RAD: *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [Huruglica] at paragraphs 30 and 35.



[35] The issue in this application is whether the Decision was reasonable.

[36] The Applicants argue that the Decision is unreasonable for two reasons. First, the RAD selectively reviewed country condition documents and failed to engage with evidence about the risks faced by people with HIV. Second, the RAD erred in its assessment of the Applicants' credibility and made improper plausibility findings.

[37] A decision is reasonable if the decision-making process is justified, transparent and intelligible resulting in a determination that falls within the range of possible, acceptable outcomes which are defensible on the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47 [*Dunsmuir*].

[38] Recently, the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] extensively reviewed the law of judicial review of administrative decisions. The Supreme Court confirmed that judicial review of an administrative decision is presumed to be on the standard of reasonableness subject to certain exceptions that do not apply on these facts: *Vavilov* at paragraph 23.

[39] Citing *Dunsmuir*, the Court confirmed in *Vavilov* that a reasonable decision is one that displays justification, transparency and intelligibility with a focus on the decision actually made, including the justification for it: *Vavilov* at paragraph 15.

[40] As this application was argued on the basis that the standard of review is reasonableness, I find it is not necessary to receive further submissions from the parties. The result in this matter would be the same under the pre-*Vavilov* framework established in *Dunsmuir* and its progeny.

#### IV. Analysis

[41] I have determined that the RAD erred in assessing the country condition documents and the risk to Ms. Salako in Nigeria due to her HIV status. Therefore, I find it is not necessary to address the second argument made by the Applicants regarding credibility and implausibility findings made by the RAD. I am satisfied that the RAD did not engage with the evidence put before it as to the risks faced by people with HIV in Nigeria.

[42] In a somewhat difficult to understand statement the RAD, after noting that Ms. Salako had received treatment for HIV for three years before leaving Nigeria, acknowledged it was aware of country documentation “of discrimination against HIV positive people in Nigeria, and that this should indicate that the Principal Appellant would face a serious possibility of persecution there due to stigma.”

[43] However, the RAD next said the problem with that evidence was that Ms. Salako had received treatment to manage the virus and the only reference to other ill-treatment from her HIV status was the fear of her family kidnapping her children.

[44] The RAD equated receipt of HIV treatment with lack of discrimination:

[35] The Principal Appellant successfully lived in Nigeria for three years, receiving treatment, and with no harm coming to the

children as feared. The country information about stigma against HIV positive people in Nigeria goes back to those times and has not changed. [ . . . ]

[45] There are two significant problems with this line of reasoning by the RAD.

[46] One problem is that the statement “stigma against HIV positive people in Nigeria [ . . . ] has not changed” is unaccompanied by any reference to or analysis of the documentary evidence in the Certified Tribunal Record [CTR]. The RAD makes a statement and draws a conclusion without any explanation as to how it arrived at that conclusion.

[47] Nor does the RAD specify the nature or degree of stigma against HIV positive people in Nigeria to which it refers. The result is that the Court is unable to determine from the reasons provided how or why the RAD found that there was a stigma against HIV positive people but that the stigma was not enough to lead to a serious possibility of persecution in Nigeria if Ms. Salako returned there.

[48] The other problem, equally significant, is that the RAD equates receiving treatment for HIV with a lack of risk of discrimination or persecution. When it subsequently addressed the failure by the RPD to assess the forward-looking risk arising from Ms. Salako’s HIV status, the RAD provided no clarification:

[37] It is true that the RPD did fail to properly address whether the Principal Appellant would face a forward looking serious possibility of persecution due to her HIV status. However, after having conducted my own independent analysis, even with this error, I find that the Appellant would not face a serious possibility of persecution due to her HIV status if she were to be returned to Nigeria.

[49] Review of the underlying record does not clarify how or why the RAD came to that conclusion. The evidence in the NDP included a 2018 Human Rights Report on Nigeria as well as a 2016 UNAIDS Report and a Swiss Refugee Council report detailing ongoing discrimination in the form of denial of access to health services and loss of employment for those who are HIV positive.

[50] In terms of antiretroviral treatment availability in Nigeria, the Applicants in their submissions to the RAD specifically noted that the Swiss Refugee Council report stated that only 29 – 35% of HIV-positive individuals in Nigeria had access to healthcare that was actually effective. The remainder received either no care or inappropriate care.

[51] The Applicants also noted in their submissions to the RAD that Ms. Salako's prior ability to obtain treatment for her HIV status was irrelevant to a forward-looking risk assessment.

[52] Other submissions made by the Applicants to the RAD noted the passage in 2014 of the Same Sex Marriage Prohibition Act [SSMPA] which "renders illegal all forms of activity supporting or promoting lesbian, gay, bisexual, transgender, and intersex (LGBTI) rights." The Applicants also referred to jurisprudence of this court indicating that laws which require individuals to repress immutable characteristics such as their sexual orientation are always persecutory.

[53] None of this evidence was referred to by the RAD when it conducted an analysis of whether Ms. Salako would be faced with more than a mere possibility of persecution in Nigeria.

[54] The RAD is entitled to weigh the evidence and make findings with which the Applicants would not agree. It is also entitled to deference from this Court. When the reasons of the RAD do not show whether or how the RAD weighed the evidence, but instead appear to show the evidence was not considered, then there is nothing to which the Court can reasonably defer.

[55] As “reasons are the means by which the decision maker communicates the rationale for its decision”, the reasons provided by the RAD are central to this judicial review: *Vavilov* at paragraph 84.

[56] The Supreme Court confirmed in *Vavilov* that “it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision maker to those whom the decision applies”: at paragraph 86.

[57] The RAD did not address the core of the case put to it by the Applicants. The result is that it is not possible to discern the factual and legal basis upon which the RAD arrived at the conclusions it did. The Decision is thereby unreasonable.

## V. **Summary and Conclusion**

[58] While the RAD acknowledged that the Applicants submitted country condition documents in addition to those already in the NDP, the panel made little to no reference to the those documents.

[59] The RAD also did not address the detailed submissions made by the Applicants. Those submissions were supported by specific references to the documentary evidence before the RAD. By not addressing the specific evidence of future risk put forward by the Applicants, the RAD could not make a reasonable determination as to whether Ms. Salako would face more than a mere possibility of persecution in Nigeria given her HIV status.

[60] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*], the companion case to *Vavilov*, the majority of the Supreme Court set out at paragraphs 31 and 32 the elements of a reasonable decision:

[31] 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). Accordingly, when conducting reasonableness review “[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with ‘respectful attention’ and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion” (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand “the basis on which a decision was made” (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).

[32] A reviewing court should consider whether the decision as a whole is reasonable: “what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review” (*Vavilov*, at para. 90). The reviewing court must ask “whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).

[61] The analysis provided in the Decision is so scant that it is not possible to understand the reasoning process of the RAD. The shortcomings in the Decision are sufficiently serious that “it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency”: Vavilov at paragraph 100.

[62] Important evidence submitted to the RAD was not acknowledged or discussed. The RAD is not required to accept evidence that contradicts its findings but it is not permitted to ignore it; doing so renders a decision unreasonable: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] 157 FTR 35, 1998 CanLII 8667 (FC), at paragraphs 14 and 15.

[63] For all the foregoing reasons, this application is granted.

[64] The Decision is set aside and this matter is returned for redetermination by a different panel of the RAD.

[65] There is no serious question of general importance for certification on these facts.

[66] No costs are awarded.

**JUDGMENT in IMM-1573-19**

**THIS COURT'S JUDGMENT is that:**

1. The application is granted and the Decision is set aside.
2. This matter is returned for redetermination by a different panel of the RAD.
3. There is no serious question of general importance for certification.
4. No costs are awarded.

"E. Susan Elliott"

---

Judge



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

**DOCKET:** IMM-1573-19

**STYLE OF CAUSE:** SUSAN OLAJUMOKE SALAKO ET AL v THE  
MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** OCTOBER 23, 2019

**JUDGMENT AND REASONS:** ELLIOTT J.

**DATED:** MAY 19, 2020

**APPEARANCES:**

ADRIENNE SMITH FOR THE APPLICANTS

MICHAEL BUTTERFIELD FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Battista Smith Migration Law Group FOR THE APPLICANTS  
Barristers and Solicitors  
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT  
Toronto, Ontario