Federal Court  Cour fédérale

Date: 20210325

Docket: IMM-3851-20

Citation: 2021 FC 258

Ottawa, Ontario, March 25, 2021

PRESENT: Mr. Justice Pentney

BETWEEN:

LINDA ABIKE ABU
OLAMIDE BARAKAT ABU
OMOTOLA RIHANAT ABU

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants, Linda Abike Abu (Principal Applicant), and her two minor daughters, Olamide Barakat Abu and Omotola Rihanat Abu, are citizens of Nigeria who claimed refugee status in Canada. The Principal Applicant has a third daughter who had also claimed refugee status. She is not an applicant in this matter because the Refugee Appeal Division (RAD) accepted her refugee claim, finding that she was at risk of persecution because of the pressure her father's family was exerting on her parents to have her undergo female genital mutilation

(FGM). The RAD also found, however, that the Applicants had not established their claims of a risk of persecution or personal harm, and it therefore dismissed their appeals from the negative finding of the Refugee Protection Division (RPD).

[2] The Applicants submit that the RAD decision should be overturned on a number of grounds.

[3] I agree. The RAD decision is unreasonable because it failed to analyze the Principal Applicant's claim that she faced a risk of persecution due to her refusal to allow FGM to be performed on her eldest daughter. I also find that the RAD's analysis of the Principal Applicant's claims that she faced a risk of persecution because she had been accused of practicing witchcraft to be unreasonable. In addition, given the interconnected nature of the claims, the RAD's analysis of the claims of the two minor daughters is also unreasonable.

[4] The Principal Applicant's refugee claim rested on her assertion that her mother-in-law had branded her a witch and threatened her with harm if she did not give up her eldest daughter for FGM. The Principal Applicant had herself undergone FGM as a child, and she said that her mother-in-law had subjected her two younger daughters to the practice without her knowledge or consent while she was hospitalized following difficult childbirths. Some years later, the mother-in-law asked her son to allow FGM to be performed on the eldest daughter when she turned nine years of age, in accordance with the rituals and customs observed by the family.

[5] The Principal Applicant decided she would not agree to this. She convinced her husband to take the family on a vacation to the United States. Once there, the Principal Applicant refused to return to Nigeria in order to protect her eldest daughter from FGM. The husband returned to

Nigeria, but the Principal Applicant and her daughters stayed in the United States, where they lived without status for several years before coming to Canada to claim refugee status.

[6] The RPD dismissed the claims of the Principal Applicant and her three daughters. It found that the Principal Applicant's narrative was not credible because she had claimed to be unaware of the fact that her two younger daughters had been subjected to FGM until she was advised of this by her husband many years after the event. Further, the documentary evidence did not support her fear that she would be forced to give up her eldest daughter for FGM, or that her younger daughters would be taken from her.

[7] The appeal to the RAD was partially successful. The RAD accepted that the eldest daughter faced a risk of being subjected to FGM, and that she had no internal flight alternative (IFA) in Nigeria. However, the RAD did not accept the Principal Applicant's claim or that of her two younger daughters. It found that although the Principal Applicant was credible, she had provided insufficient evidence to support her fear of persecution on the basis of being accused of witchcraft by her mother-in-law. The RAD found that this accusation had not been made publicly nor was it known by the community, and thus it concluded that the Principal Applicant did not have a reasonable fear of risk of persecution or harm if she returned to Nigeria. Similarly, the RAD found that the Principal Applicant had not provided sufficient evidence to support her claim that her two youngest daughters would be taken from her.

[8] The Applicants submit that the RAD decision should be overturned because it made a number of errors. I find that the determinative issue in this case is the RAD's unreasonable failure to assess the Principal Applicant's claims relating to being accused of witchcraft and for

failing to agree to submit her eldest daughter to FGM. I will therefore only briefly address the Applicants' other arguments before turning to the determinative issue.

[9] Before the RAD, the Applicants invoked the "compelling reasons" exception set out in subsection 108(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. This is an exception to the general rule that refugee status will cease if the conditions giving rise to the risk of persecution no longer exist in the country of origin. The exception applies when a claimant demonstrates that there are sufficiently compelling reasons for not wanting to return to the country of origin. The test was recently summarized in *Gomez Dominguez v Canada (Citizenship and Immigration)*, 2020 FC 1098:

> [40] Thus, when [a] claimant invokes the "compelling reasons" exception, the RPD and the RAD should consider the following questions:
>
> 1. Has the claimant, at any time in the past, met the definition of "refugee" or "person in need of protection" under sections 96 and 97 of the Act?
>
> 2. Has there been a change in circumstances in the country of origin that results in the claimant no longer meeting the definition of "refugee"?
>
> 3. If the answer to both of the above questions is yes, does the claimant have "compelling reasons" for not wanting to return to the country of origin?

[10] The Applicants claim that the RAD misstated the test for the application of the compelling reasons exception, when it stated at paragraph 60 if its reasons:

> … Before carrying out the compelling reasons analysis, there must be a clear statement conferring the prior existence of refugee status, together with an acknowledgement that the person is no longer a refugee because of circumstances have changed.

[11] They point to the evidence of the Principal Applicant's ongoing psychological distress because of her experience of FGM and because her youngest daughters were also subjected to the practice, and note that the documentary evidence supports the argument that FGM has serious ongoing effects.

[12] It is not necessary to deal with this argument in any detail. I am not persuaded that the RAD's statement of the test was inaccurate, and the RAD cites a decision of this Court as the basis for its description; the statement quoted above is an almost verbatim quote from the Federal Court decision. The RAD found that the Applicants had not established their refugee claim, and the jurisprudence is clear that if an applicant does not to meet the definition of Convention refugee or person in need of protection (whether or not there has been a formal determination on the refugee claim), a compelling reasons analysis is not applicable (*Contreras Martinez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 343 at paras 19 and 22).

[13] In addition, the Applicants have not demonstrated why the risk of persecution that motivated them to flee Nigeria no longer exists, and that is a pre-condition to the consideration of the compelling reasons exception (see *Pazmandi v Canada (Citizenship and Immigration)*, 2020 FC 1094 at paras 46-51).

[14] The Applicants also submit that the RAD's decision is unreasonable because of the inconsistent findings regarding an IFA in Nigeria. They point out that the same evidence and reasoning that led the RAD to conclude that the eldest daughter did not have an IFA should apply to the Principal Applicant and her other daughters, and they argue that this is sufficient to make the RAD's decision unreasonable.

[15] I do not accept this argument. It has long been accepted that there is no need to undertake an IFA analysis if the claimant's fears of persecution or risk of harm are not accepted (*Ghazaryan v Canada (Citizenship and Immigration)*, 2011 FC 1036 at para 8). This is because a person who does not have a fear of harm has no need to seek protection elsewhere in their country of origin. Although the RAD's findings may appear to be inconsistent, that is not itself a basis to overturn the decision when the RAD's analysis reflects the prevailing jurisprudence.

[16] Next, the Applicants submit that the RAD erred in failing to admit the new evidence they tendered on the appeal, including a letter from the Principal Applicant's husband, a further psychological report, and reports on FGM in Nigeria. I do not agree that the RAD erred. Its conclusion that the Applicants had failed to provide an explanation for why this evidence was not reasonably available prior to the hearing is consistent with the requirements of subsection 110(4) of *IRPA* and the governing jurisprudence (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96).

[17] As noted above, I find the determinative issue in this case to be the RAD's treatment of the Principal Applicant's claims that she faced a serious risk of persecution because of the threats of her mother-in-law and other relatives. The RAD summarized these claims in the following way:

> [53] The Principal Appellant alleges persecution on the basis of membership in a particular social group as a woman accused of witchcraft in Nigeria. She also alleges that she faces punishment and violence, and that she could even face death, because of her refusal to have her eldest daughter circumcised.

[18] The RAD noted that the Principal Applicant's narrative provided the basis for these fears:

> [54] The Principal Appellant stated in her [Basis of Claim form] that her mother-in-law came to her house on March 7, 2015, with some of the in-laws, knowing that her husband was not home. The mother-in-law called the Principal Appellant a wicked witch, and said she had bewitched her son into marrying her and bewitched him into not listening to the mother-in-law and other family members. The mother-in-law told the Principal Appellant to bring the Eldest Minor Appellant for circumcision, or else face the consequences. The Principal Appellant was told they would fish her out. One of the husband's aunts said to the Principal Appellant that she should remember that the only reason the family allowed her to marry her husband was because of the children she had for him.

[19] The analysis that follows in the RAD's decision focuses entirely on the risks relating to the accusation of witchcraft. There is no discussion of the statement that the Principal Applicant was to bring her eldest daughter for FGM "or else face the consequences" or that they would "fish her out" – meaning, presumably, that the family would hunt her down if she failed to comply.

[20] It is trite law that the RAD or RPD must analyze every basis of claim which is revealed in the narrative brought forward by a refugee claimant (see *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at pp 745-46; *Pastrana Viafara v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1526), where there is support in the evidence for that aspect of the claim (*Muchenje v Canada (Citizenship and Immigration)*, 2021 FC 194 at para 27). In this case, the RAD failed to demonstrate that it considered this aspect of the Principal Applicant's claim, or how it factored into its overall analysis.

[21] The RAD's failure to analyze this aspect of the Principal Applicant's claim must be assessed in the context of its decision overall. Recall that the RAD found that the eldest daughter

had a well-grounded fear of persecution because of the threat of FGM. It is notable that the eldest daughter does not appear to have been threatened directly; rather, the pressure was directed to her father and mother. The RAD concluded that the mother-in-law's threats were sufficiently serious to warrant a finding of refugee protection for the eldest daughter. However, it did not extend this analysis to consider the impact on the Principal Applicant if she refused to accede to the mother-in-law's demands.

[22] The RAD had already found the Principal Applicant to be credible. It accepted her narrative that her mother-in-law had taken her younger daughters for FGM without her knowledge or consent. It accepted that the eldest daughter faced a serious threat of being forced to undergo the same treatment at the hands of the mother-in-law. It accepted the Principal Applicant's narrative that her mother-in-law had accused her of being a witch and had demanded that she bring her eldest daughter for FGM "or else face the consequences." However, it did not analyze her claim based on this ground.

[23] In light of the evidence in the National Documentation Package for Nigeria that women who refuse to submit their children to FGM can face serious risks, and because this fear was clearly expressed by the Principal Applicant in her refugee claim and in her written submissions to the RAD, it was unreasonable for the RAD to fail to deal with it.

[24] This, in itself, is a sufficiently central and important failure to render the decision unreasonable (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 100 [*Vavilov*]).

[25] I do not agree with the Respondent's argument that this claim was intertwined with the Principal Applicant's claims relating to witchcraft. Although the two grounds are closely related, in light of the evidence that women who refuse to agree to FGM for their children face a serious risk of harm regardless of whether they are accused of witchcraft, and in light of the Principal Applicant's narrative that she would have to "face the consequences" if she refused, it is not accurate to say that the RAD dealt with the one claim by addressing the other.

[26] This is sufficient to grant the Applicants' application for judicial review.

[27] I would add, however, that I agree with the Applicants that the RAD's analysis of the Principal Applicant's claim that she feared persecution by her mother-in-law and other relatives because she was labelled a witch was unreasonable. While the RAD accepted that the practice of "witch branding" was practiced in Nigeria, it discounted the Principal Applicant's fears, because it found that she had not been threatened with any harm by her in-laws, nor had the accusation been spread in the community. The RAD, therefore, found that the evidence was insufficient to support this claim.

[28] I agree with the Applicants that the RAD's treatment of the evidence was inadequate. It refers to a document in the National Documentation Package for Nigeria that deals with the practice of "witch branding", but omits to mention that this same document states that a woman accused of witchcraft could be killed by close relatives. It was not reasonable for the RAD to rely on only part of this document, when the paragraph after the ones cited in its decision discusses the very risks that the Principal Applicant alleged (*King v Canada (Minister of Citizenship and Immigration)*, 2005 FC 774 at paras 33-35; *Marques Gontijo v Canada (Minister of Citizenship and Immigration)*, 2006 FC 962 at paras 12-13). The RAD was duty-bound to consider this

evidence, and to explain how it was factored into its analysis of the Principal Applicant's risks. A judicial review framework that seeks to "develop and strengthen a culture of justification in administrative decision making" surely demands no less (*Vavilov* at para 2).

[29] For these reasons, the application for judicial review is granted. The matter is remitted back to the RAD for reconsideration by a different panel.

[30] There is no question of general importance for certification.

JUDGMENT in IMM-3851-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The matter is remitted back to the Refugee Appeal Division of the Immigration and Refugee Board for redetermination by a different panel.

3. There is no question of general importance for certification.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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