Federal Court Cour fédérale

Date: 20210601

Docket: IMM-1066-20

Citation: 2021 FC 519

Ottawa, Ontario, June 1, 2021

PRESENT: Madam Justice Pallotta

BETWEEN:

OMOLOLA OMOTUNDE ONAJOBI
OPEYEMI MICHAEL ONAJOBI
OREOLUWA ESTHER ONAJOBI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Omolola Omotunde Onajobi, her adult son, Opeyemi Michael Onajobi, and her minor daughter, Oreoluwa Esther Onajobi, seek judicial review of a decision of the Refugee Appeal Division (RAD) of the Immigration and Refugee Board, confirming a decision of the Refugee Protection Division (RPD) that they are neither Convention refugees nor persons in need of

protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The applicants are citizens of Nigeria from Abeokuta, in Ogun State. They allege a fear of persecution by members of Ms. Onajobi's husband's family, who have demanded that Opeyemi Michael Onajobi be initiated into the Ogboni secret society to become the Chief Priest of the village, against his Christian beliefs, and that Oreoluwa Esther Onajobi undergo female genital mutilation (FGM). The husband's sister, Mme. Titilayo, accused Ms. Onajobi of being a witch and had her beaten and imprisoned for resisting the family's traditions.

[3] In March 2018, after a falling out with her husband over his failure to provide protection from his family, Ms. Onajobi obtained visas to visit another son who was attending school in Canada. About a week after their arrival, Ms. Onajobi's husband called and warned the applicants not to return home, as his relatives were adamant about carrying out the demands.

[4] The RPD rejected the applicants' refugee claims on the basis that they have viable internal flight alternatives (IFAs) in the cities of Abuja and Port Harcourt. The RAD dismissed the applicants' appeal and confirmed the RPD's conclusion.

[5] The applicants submit the RAD's decision is unreasonable. They allege the RAD erred in its assessment of whether the agents of persecution could locate them in the IFA locations. According to the applicants, Mme. Titilayo is a powerful and influential politician with connections to the government, and if they return to Nigeria, the daughter will be forced to

undergo FGM and the mother and son will be harmed. The applicants allege that the RAD also erred in its assessment of whether it would be reasonable for the applicants to move to the proposed IFA locations, in view of their circumstances, and that the RAD erred by failing to independently assess the daughter's claim.

[6] For the reasons below, the applicants have not established that the RAD's decision is unreasonable. Accordingly, this application for judicial review is dismissed.

II. **Preliminary Issue**

[7] The respondent raises a preliminary issue regarding the applicants' failure to file a personal affidavit in support of their application for judicial review. Instead, the applicants filed an affidavit sworn by a law clerk working with their counsel. Given the credibility concerns that were raised by the RPD and the RAD, the respondent argues that the failure to file a personal affidavit goes to weight, and must be considered in assessing the applicants' evidence and arguments: *Huang v Canada (Citizenship and Immigration)*, 2017 FC 1193 at para 7; *Zhang v Canada (Citizenship and Immigration)*, 2017 FC 491 at paras 12-14, citing *Dhillon v Canada (Citizenship and Immigration)*, 2009 FC 614 at para 4.

[8] The affidavit states that the law clerk reviewed the contents of the applicants' file, and attaches three exhibits: the applicants' basis of claim forms that were filed with the RPD, the applicants' memorandum of argument filed on appeal to the RAD, and the transcript of the RPD hearing on July 10, 2019. This evidence is not contested. In fact, the exhibits to the law clerk's

affidavit are a part of the certified tribunal record, which has been filed, so it is not necessary to rely on the affidavit.

[9] As a general rule, the evidentiary record before the Court on judicial review is restricted to the evidentiary record that was before the tribunal: *Assn of Universities & Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 at para 19. This is consistent with case law stating that, where an applicant does not file evidence based on personal knowledge, any alleged error in the tribunal's decision must appear on the face of the record: *Moldeveanu v Canada (Minister of Citizenship and Immigration)* (1999), 235 NR 192 (FCA) at para 15; *Ebrahimshani v Canada (Citizenship and Immigration)*, 2020 FC 89 at paras 17-22. Also, a reviewing court must refrain from reweighing and reassessing the evidence considered by the tribunal: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 125. For these reasons, I am not persuaded that the failure to file a personal affidavit should affect the weight of the applicants' evidence, or be considered in assessing the applicants' arguments in this case.

III. **<u>Issues and Standard of Review</u>**

[10] The issues on this application for judicial review are:

(1) Did the RAD err in its analysis of whether Mme. Titilayo could locate the applicants in the proposed IFAs?

(2) Did the RAD err by failing to consider all relevant factors regarding the reasonableness of relocating to the proposed IFAs?

(3) Did the RAD err by failing to independently assess the claim of the minor applicant?

[11] All three issues are reviewable according to the reasonableness standard of review: *Vavilov*; *Elmi v Canada (Citizenship and Immigration)*, 2020 FC 296 at para 8; *Armando v Canada (Citizenship and Immigration)*, 2020 FC 94 at para 31 (see also *Canada (Citizenship and Immigration) v Abdul Salam*, 2018 FC 676 at para 10).

[12] Reasonableness is a deferential but robust standard of review: *Vavilov* at paras 12-13, 75 and 85. In applying the reasonableness standard, the Court must ask whether the decision bears the hallmarks of reasonableness—justification, transparency and intelligibility: *Vavilov* at para 99. A reasonable decision is based on an internally coherent and rational chain of analysis, and it is justified in relation to the facts and law that constrain the decision maker: *Vavilov* at para 85. The party challenging the decision bears the onus of demonstrating that it is unreasonable: *Vavilov* at para 100.

IV. **Analysis**

A. *Did the RAD err in its analysis of whether Mme. Titilayo could locate the applicants in the proposed IFAs?*

[13] The applicants' central argument is that the RAD's reasoning process is not understandable and does not "add up": *Vavilov* at paras 83-87 and 102-104. The applicants submit the RAD's IFA analysis is unreasonable due to several errors in logic and inconsistent findings concerning the central issue of Mme. Titilayo's reach and influence beyond Abeokuta.

[14] According to the applicants, the RAD accepted that Mme. Titilayo is a wealthy and famous politician in Nigeria, which should have resulted in a finding that she is a state actor; yet

the RAD found that Mme. Titilayo's political background does not "classif[y] her as state actor". The RAD also assumed that Mme. Titilayo does not have the motivation or ability to locate the applicants outside of Abeokuta because the dispute started as a "family concern" and "does not engage the state".

[15] The applicants submit that it was an error for the RAD to fault them for failing to provide corroborative evidence of Mme. Titilayo's profile when the RAD had accepted their evidence that she is famous.

[16] Furthermore, the applicants submit the RAD relied on their testimony that the local police refused to protect them to support a finding that Mme. Titilayo does not have influence over the police elsewhere in Nigeria. The applicants argue that the fact that Ms. Onajobi was beaten and detained by the police, and warned to stay away from Mme. Titilayo, speaks to her strong influence.

[17] Finally, the applicants submit that, contrary to the principles in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC), the RAD's findings that Mme. Titilayo's reach and influence are local in nature ignored key evidence, which pointed to a different conclusion. This included the applicants' evidence that Mme. Titilayo is a powerful politician as a state delegate of the national ruling party and a leader in local government, and that Mme. Titilayo told the applicants that they can run but cannot hide because her agents and supporters are present in all parts of Nigeria. The applicants submit the RAD overlooked the fact that Mme. Titilayo is Ms. Onajobi's sister-in-law who has used her influence

to target the applicants in the past—Mme. Titilayo was allegedly behind a violent attack on Ms. Onajobi perpetrated by Mme. Titilayo's agents, as well as Ms. Onajobi's arbitrary arrest and detention by the local police. Thus, Mme. Titilayo not only targeted the applicants with impunity, but also used her influence to compel others to do her bidding. The applicants submit that Mme. Titilayo is unlikely to relent, as they were repeatedly targeted over a period of fifteen years, and received threatening phone calls even after they moved to a town an hour away.

[18] In my view, the RAD reasonably assessed whether Mme. Titilayo would pose a threat in the proposed IFA locations. It is within the RAD's discretion and expertise to assess and evaluate the evidence (*Vavilov* at paras 125-126) and I am not persuaded of a reviewable error in this regard. The RAD's reasons are not irrational or illogical; rather, the applicants have misinterpreted the RAD's findings.

[19] In their memorandum, the applicants "concede" the RAD's finding that Mme. Titilayo is an "influential politician"; however, the RAD did not make such a finding. The applicants also contend the RAD made a positive finding that Mme. Titilayo is a wealthy and famous politician by the statement, "…I disagree that the RPD erred in characterizing Mme. Titilayo as a wealthy and famous politician." That statement must be read in context. The RAD was addressing the applicants' argument that it was unreasonable for the RPD to expect corroborative evidence, such as media articles about Mme. Titilayo, when she maintains a low profile and "wields her power in the shadows." The applicants had argued that it was difficult to understand why the RPD chose to describe Mme. Titilayo as wealthy and famous when the applicants "said no such thing". According to the applicants, they had never suggested Mme. Titilayo is an elected

official, and had only mentioned Mme. Titilayo has strong connections to government and is influential within her party. The RAD held that the RPD was correct to draw a negative inference from the applicants' failure to provide supporting documentation about Mme. Titilayo in view of "the repetitive and consistent testimony" of Opeyemi Michael Onajobi that Mme. Titilayo is "famous". There is no error in the RAD's analysis.

[20] The RAD did not commit a logical error by faulting the applicants for their failure to provide corroborative evidence of Mme. Titilayo's profile, in view of the applicants' testimony that she is famous. As the RAD noted, the burden of proving that there is no viable IFA location rests with the applicants. The applicants asserted that Mme. Titilayo would be able to find them in the proposed IFAs due to her reach and power. The RAD found, logically and reasonably, that the applicants' failure to provide evidence to corroborate their assertion undermined their allegations that they are being pursued by Mme. Titilayo, and that she would locate them in the proposed IFAs.

[21] The RAD found that Mme. Titilayo's political background, presumptively and in itself, does not classify her as a state actor. The RAD acknowledged Mme. Titilayo's political background is "significant in considering whether she, as the agent of persecution, has the means to locate the [applicants]", but disagreed that, on the basis of her political background, the agent of persecution is necessarily the state (the applicants had asserted that persecution by a state actor would have precluded the possibility of an IFA). In reaching this conclusion, the RAD explained that the dispute between the applicants and Mme. Titilayo is a family concern that does not engage the state, and that the alleged persecution took place within the applicants'

village where Mme. Titilayo has local influence as the “Iyalaje” or head of market. The RAD reasonably found that Mme. Titilayo’s alleged control over the local police was insufficient to establish that Mme. Titilayo is a “state actor” with influence outside of Abeokuta, or that she has the means and motivation to pursue the applicants in the IFA locations. At the hearing before this Court, the applicants acknowledged that there was no evidence of Mme. Titilayo’s position within government, and that the proposed IFAs are outside of the state where Mme. Titilayo is alleged to be a state delegate.

[22] Additionally, with respect to affidavits from Ms. Onajobi’s husband, pastor, friend, and brother, the RAD reasonably noted that none of the affiants commented on Mme. Titilayo’s political profile, despite the fact that the information is highly relevant to the issue of her influence and reach, and within the affiants’ knowledge.

[23] Furthermore, the RAD reasonably agreed with the RPD that the applicants’ failure to make efforts to obtain medical records of Ms. Onajobi’s hospitalization after being detained and tortured by the police for three days, undermined the applicants’ assertion that they were being pursued by Mme. Titilayo and undermined their overall credibility. The RAD considered the applicants’ explanation that they could not obtain the medical documents because it would have delayed their “stressful, life-threatening exit from Nigeria”, and found that the evidence was inconsistent with a hasty departure. The RAD concluded that the applicants had the time and ability to compile documents before leaving Nigeria or they could have requested evidence of Ms. Onajobi’s hospitalization after arriving in Canada. In my view, these findings were open to the RAD, based on the record.

[24] I agree with the respondent that the RAD's determination turned on the applicants' failure to establish that they would face a serious possibility of persecution by Mme. Titilayo in Port Harcourt or Abuja, which was their onus to prove: *Rasaratnam v Canada (Minister of Employment and Immigration) (1991),* [1992] 1 FC 706 (CA); *Thirunavukkarasu v Canada (Minister of Employment and Immigration),* 1993 CanLII 3011 (FCA), [1994] 1 FC 589 (CA). A significant factor was the lack of corroborative evidence, particularly to support Mme. Titilayo's alleged profile. The RAD reasonably explained its concerns regarding the lack of corroborative evidence. I agree with the respondent that in the case at bar, the RAD was entitled to draw negative credibility inferences from the applicants' failure to provide corroborative evidence or a reasonable explanation for the lack thereof: *Ortiz Juarez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 288 at para 7.

[25] The applicants have not demonstrated a reviewable error in the RAD's determination that they failed to establish a risk of persecution or harm by Mme. Titilayo in Port Harcourt or Abuja.

B. *Did the RAD err by failing to consider all relevant factors regarding the reasonableness of relocating to the proposed IFAs?*

[26] The applicants did not address the second issue in oral argument, and rely on their memorandum.

[27] The applicants' position is that the RAD must conduct an independent assessment of all factors that would affect the reasonableness of relocating to a proposed IFA, and not simply address the issues that were raised by the applicants on appeal. The applicants submit that the

second prong of the IFA test requires the RAD to assess whether it would be objectively reasonable to expect the applicants to seek safety in a different part of the country, considering their particular circumstances; the applicants contend the RAD failed to do so.

[28] I agree with the respondent that the applicants have not stated which factors under the second prong of the IFA analysis were not addressed. Moreover, the applicants have not provided submissions on why the RAD's failure to address a particular factor amounts to a sufficiently serious flaw, so as to render the RAD's decision unreasonable: *Vavilov* at para 100.

[29] Furthermore, the RAD is not required to consider potential errors that an applicant did not raise: *Kanawati v Canada (Citizenship and Immigration)*, 2020 FC 12 at para 23; *Dhillon v Canada (Citizenship and Immigration)*, 2015 FC 321 at paras 18-20; *Ilias v Canada (Citizenship and Immigration)*, 2018 FC 661 at para 39.

[30] For these reasons, the applicants have not demonstrated a reviewable error in the RAD's analysis of the reasonableness of relocating to the proposed IFAs.

C. *Did the RAD err by failing to independently assess the claim of the minor applicant?*

[31] The applicants did not address the third issue in oral argument, and rely on their memorandum.

[32] The applicants' position is that the RAD failed to independently consider the alleged fear of the minor applicant. Given the minor applicant's fear of FGM, her vulnerability, and the

forward-looking nature of the fear, the applicants submit the RAD was required to consider the minor applicant's claim.

[33] The applicants conceded at the hearing that the third issue was not raised on appeal to the RAD, and that it is not material to the RAD's IFA analysis, which was the determinative issue.

[34] For these reasons, the applicants have not established that the RAD's decision is unreasonable based on the third issue. It is unnecessary to further address the third issue.

V. **Conclusion**

[35] The applicants have not established that the RAD's decision is unreasonable. This application for judicial review is dismissed.

[36] Neither party proposes a question for certification. In my view, there is no question to certify in this case.

JUDGMENT in IMM-1066-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Christine M. Pallotta"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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