Federal Court Cour fédérale

Date: 20210830

Docket: IMM-796-20

Citation: 2021 FC 894

Ottawa, Ontario, August 30, 2021

PRESENT: Madam Justice Walker

BETWEEN:

EMMANUEL EMUZE
OMONOR EMUZE
OSOSE DANIEL EMUZE
EBEHIREMEN MICH EMUZE
EBOSETALE CHRIS EMUZE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants are citizens of Nigeria. They seek judicial review of a decision of the Refugee Appeal Division (RAD) dated January 10, 2020 confirming the refusal of their refugee claims. The RAD agreed with the Refugee Protection Division (RPD) that the Applicants have

viable internal flight alternatives (IFAs) available to them in Abuja, Port Harcourt and Ibadan, Nigeria.

[2] For the reasons that follow, the application will be allowed. Briefly, the RAD failed to consider the Applicants' evidence that their agents of persecution had traced them from their rural home to Lagos in its assessment of the persecutors' ability to find the family in the IFAs. This omission is a significant error in the RAD's decision as it undermines the justification given for the panel's primary conclusion on the first prong of the test for an IFA.

I. Background

[3] The Applicants are a family of five. Mr. Emmanuel Emuze, the Principal Applicant, is the husband of Ms. Omonor Emuze and father of their three minor children. The Applicants fear a return to Nigeria because the Principal Applicant's paternal family intends to subject him to traditional rituals as the eldest son of his late father, an idol worshipper, and to inflict female genital mutilation (FGM) on the female Applicants.

[4] Following the death of his father in October 2016, the Principal Applicant was expected to take over the father's duties. He resisted doing so and was attacked by family members. The Principal Applicant reported the attack to the authorities but they failed to take action. Due to their continuing fear of reprisals, the Applicants moved to Lagos but the Principal Applicant's family discovered their whereabouts.

[5] The Applicants left Nigeria in December 2017. They arrived in Canada on December 23, 2017 and claimed refugee protection.

[6] The RPD refused their claims on April 29, 2019 on the basis of IFAs available to them in Abuja, Port Harcourt and Ibadan, Nigeria.

II. <u>Decision under review</u>

[7] The question of one or more IFAs for the Applicants was the determinative issue in the appeal. On the basis of the IFAs in Abuja, Port Harcourt and Ibadan, the RAD confirmed the RPD's decision that the Applicants 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).

[8] The RAD first found no error in the RPD's application of Jurisprudential Guide TB7-19851 (JG TB7-19851) in reliance on this Court's decision in *Canadian Association of Refugee Lawyers v Canada (Citizenship and Immigration)*, 2019 FC 1126 (at para 7). The panel then considered both elements of the well-established test for an IFA (*Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (CA) (*Rasaratnam*)).

[9] The RAD observed that the Applicants had made no specific arguments on appeal contesting the RPD's conclusion that they had failed to demonstrate that their agents of persecution would seek them out in the proposed IFAs. Nevertheless, the panel confirmed the RPD's conclusion by reference to the Principal Applicant's testimony at the RPD hearing. In the

course of that testimony, the Principal Applicant was asked whether he and his family could relocate and live in any of the proposed IFAs. In response, the Principal Applicant made no mention of his paternal family being able to find the Applicants in the IFAs. The RAD also noted that there was nothing in the Applicants' appeal memorandum indicating that their agents of persecution had either the motivation or means to locate them in the IFAs. With respect to general safety issues in the three cities, including kidnappings and robberies, the panel found that the Applicants had not established that they would be at risk pursuant to section 97 of the IRPA on the basis of general criminality in any of the proposed IFAs.

[10] The RAD then confirmed the RPD's findings regarding the reasonableness of the IFAs for the Applicants. The panel addressed their appeal submissions regarding the difficulties they would encounter in finding employment and housing in Port Harcourt, risk at the hands of Boko Haram in Abuja due to their Christian religion, and risk from Fulani Herdsman in Ibadan. The RAD referred to JG TB7-19851 and its non-exhaustive list of factors that may be considered in assessing the second prong of the IFA test. The panel found that the RPD adequately considered all of the factors except religion, indigeneship and availability of medical and mental health care. The RAD addressed the omitted factors, concluding in each case that the particular factor did not establish unreasonableness for the Applicants in the IFA cities.

III. Preliminary Issue

[11] The Respondent submits that the Applicants' failure to file an affidavit in support of their application for judicial review may be sufficient to reject the application (then paragraph 10(2)(d) of the *Federal Courts Citizenship, Immigration and Refugee Protection*

Rules, SOR/93-22; amended June 27, 2021 and is now subparagraph 10(2)(a)(v)). The Respondent acknowledges that the absence of a personal affidavit does not require automatic rejection of an application for judicial review but argues that it is the recognized best practice to do so.

[12] In lieu of a personal affidavit, the Applicants filed an affidavit (the Gossin affidavit) sworn by an articling student who was working with their counsel. The Gossin affidavit does not seek to place new evidence before this Court. Instead, it provides as exhibits copies of various documents, including the RPD decision, the Applicants' refugee documents, and their written submissions to the RPD, documents that are also contained in the certified tribunal record (CTR).

[13] In my view, the essential facts necessary to the determination of this application are before me by virtue of the Gossin affidavit and the CTR. Little turns on the absence of a personal affidavit and I find that the Applicants' failure to provide a personal affidavit is not fatal in the circumstances.

IV. Issue and standard of review

[14] The issue in this application is whether the RAD erred in concluding that the Applicants have a viable IFA in each of Abuja, Port Harcourt and Ibadan. The RAD's decision is subject to review on a reasonableness standard (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 23 (*Vavilov*); *Onuwavbagbe v Canada (Citizenship and Immigration)*, 2020 FC 758 at para 20). A reasonable decision is based on "an internally

coherent and rational chain of analysis" and "is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85).

[15] The onus is on the Applicants to demonstrate that the RAD's decision is unreasonable. To set aside a decision on this basis, the Court must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

V. Analysis

[16] The concept of an IFA is integral to the definition of a Convention refugee. If a claimant can seek refuge within their own country, there is no basis for finding that they are unable or unwilling to avail themselves of the protection of that country. Put differently, a claimant must be a refugee from a country and not only from one part of the country to be entitled to Canada's protection (*Sadiq v Canada (Citizenship and Immigration)*, 2021 FC 430 at para 39).

[17] As I noted above, the test for determining if there is a viable IFA was set out by the Federal Court of Appeal in *Rasaratnam*. The RAD must be satisfied on a balance of probabilities that:

1. The Applicants will not be subject to a serious possibility of persecution or a section 97 risk in the proposed IFAs; and
2. Conditions in the parts of the country proposed as IFAs must be such that it would not be unreasonable in all the circumstances, including those particular to the Applicants, for them to seek refuge there.

[18] The test has been cited many times in the jurisprudence of this Court. The onus rests on the Applicants to demonstrate that at least one prong of the test has been defeated (*Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 (CA); *Obotuke v Canada (Citizenship and Immigration)*, 2021 FC 407 at para 16).

[19] The Applicants challenge the RAD's analysis of both prongs of the *Rasaratnam* test. They argue that the RAD erred in (1) failing to consider the particular risk(s) of persecution they allege; (2) rejecting the Applicants' uncontradicted and accepted testimony; and (3) finding that it would not be unreasonable for the Applicants to relocate to any of the IFAs without regard to their personal circumstances.

[20] It is not necessary to deal with each of these issues in detail because I find that the RAD's failure to engage with the evidence that the Applicants had been traced to Lagos by their agents of persecution results in an illogical chain of reasoning and a decision that is not justified against the evidence. This omission is a significant error in the decision and requires redetermination of the Applicants' RAD appeal.

[21] I will address briefly the Applicants' submission that the RAD unreasonably failed to consider their specific risk of persecution, notably the risk of FGM for the female Applicants. The Applicants are correct in stating that the RAD did not deal with the risk of FGM but I find that its failure to do so is not a reviewable error. The RAD concluded that the Applicants had not established, on a balance of probabilities, that the Applicants' agents of persecution had the means or were motivated the find them in the IFA. The panel's analysis was not premised on the

particular risks faced by the Applicants. It was focussed on the ability and desire of the Principal Applicant's family members to find them. While I will address the shortcomings in the panel's analysis in this regard, the RAD did not commit a reviewable error in focussing on the persecutors and not the specific risks alleged by the Applicants. Put another way, if the Applicants are not at risk from the agents of persecution in the IFAs, the nature of the feared harm is not a determinative factor.

[22] In addition, the Applicants raised no issue in their appeal submissions regarding the RPD's analysis of the first prong of the IFA test. In *Vavilov*, the Supreme Court stated that a reviewing court must "read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered" (at para 94). The RAD is not required to address potential issues that the appellants did not raise (Rule 3(3)(g) of the *Refugee Appeal Division Rules*, SOR/2012-257; *Kanawati v Canada (Citizenship and Immigration)*, 2020 FC 12 at paras 23-24).

[23] The RAD's error in this case lies in its analysis of the agents of persecution and their ability to locate the Applicants beyond the rural setting from which the family fled to major cities in Nigeria. The difficulty with the analysis is that, earlier in its decision, the RAD acknowledged that their persecutors had been able to determine that the Applicants had fled to Lagos.

[24] The RAD's finding that the Applicants had not established a serious risk of persecution or section 97 risk was based primarily on its conclusion that their agents of persecution had neither the ability nor the motivation to find them in any of the IFAs. In the course of its

analysis, the RAD noted that the Principal Applicant had not mentioned during his testimony that members of his paternal family would be able to find them in the IFAs, nor was there a statement to this effect in their appeal memorandum. However, the RAD included in its recital of the basis of the Applicants' claim the fact that they had moved to Lagos following the attack on the Principal Applicant but that the family had found out about their new location. This statement is consistent with the recitation of facts in the Applicants' appeal submissions.

[25] The RAD's assessment of the paternal family's ability to locate the Applicants within Nigeria is internally inconsistent. The panel's failure to link the persecutors' knowledge that the Applicants had moved to Lagos to its conclusion that the agents of persecution would not be able to track them to the IFAs cannot be saved by the Respondent's reliance on the lack of a discrete argument on this issue in the appeal submissions. Although not in the form of a separate submission, the Applicants refer to this tracking ability in their appeal submissions. The RAD acknowledges the submission in the decision.

[26] I recognize that the fact the agents of persecution traced the Applicants to Lagos in late 2017 is not determinative of whether they have the ability to find the Applicants in the IFAs or that they remain motivated to do so. I accept the Respondent's submissions in this regard. However, the omission of any reference to a significant and uncontradicted element of the Applicants' narrative which touches directly on the RAD's determinative finding on the first prong of the IFA test is a reviewable error (*Zablon v Canada (Citizenship and Immigration)*, 2013 FC 58 at paras 21-22).

VI. Conclusion

[27] The application is allowed.

[28] No question for certification was proposed by the parties and none arises in this case.

JUDGMENT IN IMM-796-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. No question of general importance is certified.

"Elizabeth Walker"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	EMMANUEL EMUZE, OMONOR EMUZE, OSOSE DANIEL EMUZE, EBEHIREMEN MICH EMUZE, EBOSETALE CHRIS EMUZE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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