Federal Court  Cour fédérale

Date: 20210917

Docket: IMM-6844-19

Citation: 2021 FC 964

Ottawa, Ontario, September 17, 2021

PRESENT: Madam Justice Pallotta

BETWEEN:

IBRAHIM OLANREWAJU LAWAL
JEMILA ABIOLA LAWAL
ZAINAB AYOMIDE LAWAL
FUAD ABOLAJI LAWAL

Applicants

and

THE MINISTER OF CITZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ibrahim Olanrewaju Lawal, his spouse, Jemila Abiola Lawal, and their two daughters are citizens of Nigeria. They allege a fear of persecution by members of Mr. Lawal's extended family who insist that the 13-year-old daughter undergo female genital mutilation (FGM). The

Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada determined that the applicants have a viable internal flight alternative (IFA) within Nigeria, in Benin City, and as a result 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*]. The Refugee Appeal Division (RAD) dismissed the applicants' appeal and confirmed the RPD's determination that Benin City is a viable IFA.

[2] On this application for judicial review, the applicants submit that the RAD's decision is unreasonable and should be set aside. They allege the RAD erred in its assessment of whether it would be reasonable to move to the proposed IFA location in view of their circumstances (i.e., the "second prong" of the IFA test) because the RAD failed to independently assess whether it would be reasonable for the 13-year-old daughter to relocate to Benin City as a minor child who is the target of the extended family's demands of FGM. While the applicants did not raise this issue on appeal to the RAD, they submit the RAD was nevertheless required to consider and address it on the basis that whether an IFA exists is a component of the definition of a Convention refugee; it was incumbent on the RAD to decide whether the definition was met, and the RAD's failure to apply the law to the facts before it constitutes a reviewable error.

[3] 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. **Issue and Standard of Review**

[4] The parties agree that the Court should apply the reasonableness standard of review, according to the Supreme Court of Canada's guiding principles in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. The sole issue on this application for judicial review is whether the RAD's determination of a viable IFA in Benin City is reasonable.

[5] Reasonableness is a deferential but robust form of review: *Vavilov* at paras 12-13, 75 and 85. A reviewing court must determine 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.

III. **Analysis**

A. *The parties' positions*

[6] The applicants submit that the RAD's IFA determination is not justified by the reasons or the reasoning process because the RAD failed to take relevant considerations into account (*Vavilov* at paras 86-87) by not conducting a focused assessment of the daughter's circumstances as a child fleeing FGM.

[7] The applicants acknowledge that the concept of the best interests of a child (BIOC) is not incorporated into section 96 of the *IRPA* and does not alter the definition of a Convention refugee; however, they argue that the concept of BIOC should inform the IFA analysis. In this regard, the applicants submit Article 3.1 of the *Convention on the Rights of the Child*, 20 November 1989, 3 UNTS 1577, Can TS 1992 No 3 (entered into force 2 September 1990) states that the BIOC shall be a primary consideration in all actions involving children, including those undertaken by administrative authorities. Similarly, paragraphs 53 and 55 of the UNHCR's *Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees* (HCR/GIP/09/08, 22 December 2009) indicate that the reasonableness of an IFA may differ between an adult and a child, and the BIOC should inform the analysis. The applicants argue that section 3(3)(f) of the *IRPA* states that the provisions of that statute shall be construed and applied in a manner that complies with Canada's international human rights obligations. Additionally, the Supreme Court of Canada has recognized that the values reflected in international human rights laws may help to inform statutory interpretation, even when the applicable international treaties and conventions are not part of Canadian law because they have not been implemented by statute: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 69-71, 1999 CanLII 699.

[8] Furthermore, the applicants submit that the reasoning in *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61—that humanitarian applications must be assessed with the BIOC in mind—should apply to the second prong of the IFA test, given that the IFA test is not tied to the definition of persecution and takes into account a broad range of circumstances.

[9] According to the applicants, given that the RAD carries a mandate to assess and determine refugee claims, the fact that this issue was not raised before the RAD does not limit the scope of an appeal. The applicants argue that it was incumbent on the RAD to conduct a focused assessment of the daughter's overall circumstances as a child fleeing FGM in order to determine whether she meets the definition of a Convention refugee. They rely on the Supreme Court of Canada's decision in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 745, 1993 CanLII 105 [*Ward*] where the Court held that "[i]t is for the examiner to decide whether the Convention definition is met".

[10] The applicants submit that while the RAD's statement about the ability to attend school is likely a reference to the daughter's circumstances, it does not amount to a focused assessment of her overall circumstances. The applicants rely on *Elmi v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 7688 at paragraph 13, [1999] FCJ No 336 (FCTD), where the Court stated that in having regard to a particular claimant's circumstances, considerations of "[w]hat is merely inconvenient for an adult might well constitute 'undue hardship' for a child".

[11] The applicants argue that there was evidence showing the agents of persecution were motivated to locate the daughter because the applicants were tracked down after relocating from Lagos to Zaria (in a different state) where Ms. Lawal's parents reside. Even though there was no evidence about the daughter's social media use, the applicants contend that it is reasonable to assume a teenager would make use of social media and this could expose her to the agents of persecution. They submit it would be unreasonable to expect the daughter to abstain from using social media contrary to her rights to freedom of expression (Article 19 of the *Universal*

Declaration of Human Rights, GA Res 217 A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71, and Article 19.2 of the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976)). The applicants assert the RAD was obliged to consider whether an IFA in Benin City would be reasonable for the daughter in light of the evolving definition of freedom of expression through social media.

[12] Furthermore, the applicants submit the RAD should have considered whether it is reasonable to expect a 13-year-old girl to relocate within Nigeria with a "cloud hanging over her", and it was obliged to assess the fear that a young teenager would harbour and whether such fear might render an IFA unreasonable. Even if there was insufficient evidence that the agents of persecution could locate her in Benin City, and even without a serious possibility that she would face risk of FGM there, the daughter's fear and the fact that her parents may not be able to control the situation should have been factored into her ability to live free from fear.

[13] Had the RAD determined that the proposed IFA location was unreasonable in light of the daughter's particular circumstances, the applicants submit the RAD could have found that none of them have a reasonable IFA given the daughter's inability to live on her own.

[14] The respondent submits that the failure to raise an issue before the RAD does affect the scope of an appeal, as it is an applicant's obligation to identify errors by the RPD and to make submissions accordingly: Rule 3(3)(g) of the *Refugee Appeal Division Rules*, SOR/2012-257 [*RAD Rules*]; *Broni v Canada (Minister of Citizenship and Immigration)*, 2019 FC 365 at para

15. The respondent states that Mr. Lawal was appointed the designated representative for his daughter and advised of his duty to act in her best interest, yet neither the applicants nor their counsel raised any issue before the RPD or the RAD regarding the daughter's use of social media or her perceived fear in the proposed IFA location. The RAD was not obliged to search the record to assist the applicants in making their case, and the applicants cannot fault the RAD for failing to engage with arguments they did not raise or support with evidence: *Cruz v Canada (Minister of Citizenship and Immigration)*, 2020 FC 22 at para 30.

[15] Furthermore, the respondent submits the second prong of the IFA test requires "actual and concrete evidence" of conditions that would jeopardize the applicants' lives and safety in travelling or temporarily relocating to a safe area: *Hamid v Canada (Minister of Citizenship and Immigration)*, 2020 FC 145 at para 55 citing *Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164 at para 15, 2000 CanLII 16789 (FCA) [*Ranganathan*]; *Mansour v Canada (Minister of Citizenship and Immigration)*, 2021 FC 40 at para 52 citing *Ranganathan* at para 15. The applicants did not adduce evidence of the daughter's social media activity or evidence to demonstrate an inability to relocate to Benin City based on her perceived fear. The respondent submits that the RAD's decision is based on the evidence before it, and responsive to the applicants' arguments on appeal.

B. *Analysis*

[16] The test for assessing whether a viable IFA exists is well-established. As noted in *Rasaratnam v Canada (Minister of Employment and Immigration)* (1991), [1992] 1 FC 706 at 711, 140 NR 138 (FCA):

> […] the Board was required to be satisfied, on a balance of probabilities, that there was no serious possibility of the appellant being persecuted in [the IFA] and that, in all the circumstances including circumstances particular to him, conditions in [the IFA] were such that it would not be unreasonable for the appellant to seek refuge there.

[17] The applicants do not challenge the RAD's "first prong" finding that they do not face a serious possibility of persecution in the proposed IFA of Benin City. The RAD found the applicants' claims about the extended family's ability to locate them in Benin City to be vague and speculative, and concluded there was insufficient evidence to establish the extended family's ability to locate the applicants in Benin City.

[18] With respect to the second prong of the IFA test, it is clear from the jurisprudence that a refugee claimant bears the onus of establishing that it would be unreasonable to seek refuge in a proposed IFA. If there is a safe haven for claimants in their own country, where they would be free of persecution according to the first prong of the IFA test, they are expected to avail themselves of it unless they can show that it is objectively unreasonable for them to do so: *Thirunavukkarasu v Canada (Minister of Employment and Immigration)* (1993), [1994] 1 FC 589 at 7, 1993 CanLII 3011 (FCA) [*Thirunavukkarasu*].

[19] The applicants correctly point out that the second prong of the IFA test is a flexible one that takes into account the particular claimant's situation and the particular country involved: *Thirunavukkarasu* at 7. However, the RAD is constrained by the evidence before it and the facts of which it may take notice: *Vavilov* at para 106. It was the applicants' onus to put forward evidence and arguments supporting their position that the proposed IFA of Benin City is

unreasonable in view of the daughter's particular circumstances, and they did not. The applicants' assertion that the daughter is potentially subject to a risk that her location will be discovered by agents of persecution through social media is not grounded in the evidence and it is not a fact that the RAD should have recognized by judicial notice—particularly since the applicants did not raise any issue regarding social media before the RPD or the RAD, under either prong of the IFA test (as noted above, the applicants do not challenge the "first prong" finding that they do not face a serious possibility of persecution in the proposed IFA). Similarly, the applicants do not point to any evidence about the daughter's particular fears or whether she would unreasonably have to endure a "cloud hanging over her" in Benin City. For example, as the respondent points out, the applicants did not tender a psychological assessment. The applicants do not point to any evidence that the RAD overlooked.

[20] In addition, the RAD's reasons must be read in light of the history and context of the proceedings in which they were rendered, including the applicants' submissions: *Vavilov* at para 94. As this Court explained in *Kanawati v Canada (Minister Citizenship and Immigration),* 2020 FC 12 at paragraph 23, the RAD's decision must be assessed in the context of how the applicants framed their appeal, and the RAD is not required to consider potential errors that were not raised. The RAD considered and addressed the only argument advanced by the applicants regarding the second prong of the IFA test, namely, whether the applicants would need to live perpetually in hiding in Benin City due to a fear that Mr. Lawal's extended family would find them. The RAD also considered and addressed the applicants' argument that the RPD had assessed only one of identified risks for the daughter, circumcision, and failed to consider two other risks that were identified: facial markings and cleansing rituals. I agree with the

respondent that the RAD cannot be faulted for failing to engage with arguments that the applicants did not raise or support with evidence on appeal: Rule 3(3)(g) of the *RAD Rules*; *Ghauri v Canada (Minister of Citizenship and Immigration)*, 2016 FC 548 at para 34.

[21] I am not persuaded by the applicants' argument, relying on *Ward* among other decisions, that it was incumbent on the RAD to consider the BIOC and to conduct a focused assessment of the daughter's overall circumstances as a child fleeing FGM, even though the applicants did not raise the issue on appeal to the RAD. It is not part of the RAD's appellate role to supplement the weaknesses of an appeal before it: *Dhillon v Canada (Minister of Citizenship and Immigration)*, 2015 FC 321 at paras 18-20. Moreover, this point is not determinative of the application for judicial review because the evidentiary record does not provide a factual basis for the assessment that the applicants allege the RAD should have conducted. Claimants are required to provide "actual and concrete evidence" to support their arguments that a proposed IFA would be unreasonable: *Ranganathan* at para 15. The record does not include evidence of the daughter's social media use or her perceived fears that would render the proposed IFA unreasonable, and the applicants do not point to any other factors to support a finding that relocating to Benin City is unreasonable in view of the daughter's particular circumstances. In the absence of a factual basis that would allow the RAD to conclude that relocating to Benin City would be unreasonable based on the daughter's particular circumstances, the applicants have not met their burden to establish a sufficiently serious shortcoming such that the RAD's decision cannot be said to exhibit the requisite degree of justification, intelligibility, and transparency: *Vavilov* at para 100.

IV. **Proposed Question for Certification**

[22] The applicants proposed the following question for certification at the hearing:

> When an applicant fails to raise a legal error before the RAD in an appeal from a RPD decision, is the RAD obliged to correct that error when the error is based on the failure to correctly apply the Convention refugee definition to the record before it?

[23] The applicants did not raise any question for certification in their written memorandum or notify the respondent in accordance with this Court's Practice Guidelines for Citizenship, Immigration, and Refugee Law Proceedings dated November 5, 2018. The respondent objects to the question on the basis of prejudice to the respondent, and the lack of any reason why the applicants could not have raised the question earlier. In the alternative, the respondent requests an opportunity to make submissions in response. I reserved on the objection, and indicated at the hearing that if I were to allow the applicants to raise the proposed question, I would consider whether to provide an opportunity for the respondent to make submissions in writing.

[24] I have considered whether I should certify the proposed question as a question of general importance under section 74(a) of the *IRPA*. I do not require submissions from the respondent as I am not satisfied that the applicants' proposed question should be certified.

[25] The applicants' only submission regarding the proposed question is that the question meets the requirements set out in *Lunyamila v Canada (Minister of Public Safety and Emergency Preparedness)*, 2018 FCA 22 at paras 3 and 46 [*Lunyamila*]. I disagree.

[26] In order to be properly certified under section 74 of the *IRPA*, a proposed question must be dispositive of the appeal, must transcend the interests of the parties, and must raise an issue of broad significance or general importance: *Lewis v Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36 [*Lewis*]. The question must have been dealt with by the Court and must necessarily arise from the case itself, as opposed to the way in which the Court may have disposed of the case: *Lewis* at para 36.

[27] The proposed question for certification does not meet this test. The proposed question is not determinative of this application for judicial review and would not be dispositive of the appeal: *Lewis* at para 36; *Lunyamila* at paras 3 and 46. Rather, the proposed question amounts to a reference of a question to the Court of Appeal, and as such it is not a proper question for certification: *Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89 at para 12.

V. **Conclusion**

[28] The applicants have not established that the RAD's decision is unreasonable and accordingly, the application for judicial review is dismissed.

[29] I have considered the question proposed for certification and decline to certify the proposed question.

JUDGMENT in IMM-6844-19

THIS COURT'S JUDGMENT is that:

1. This 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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