

Federal Court



Cour fédérale

Date: 20211029

Docket: IMM-2062-20

Citation: 2021 FC 1150

Toronto, Ontario, October 29, 2021

PRESENT: Justice Andrew D. Little

BETWEEN:

**ISAAC FAVOUR OLOBOR
DANIEL ELOGHOSA ISAAC-OLOBOR
(Minor)
DAVID UYIOGHOSA ISAAC-OLOBOR
(Minor)**

Applicants

And

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] In this application for judicial review, the applicants challenge a decision of the Refugee Appeal Division (the “RAD”) dated February 25, 2020. The RAD dismissed their claims for Convention refugee status and for protection under sections 96 and 97 of the *Immigration and*

Refugee Protection Act. They ask this Court to set aside the RAD's decision and remit their claims for redetermination.

[2] The applicants are Isaac Olobor and his two sons, David and Daniel. All three and their spouse/mother, Iyabo Olobor, sought protection in Canada on the basis that members of Mr Olobor's extended family or the police would persecute them if they returned to Nigeria because they believe that Ms Olobor is a lesbian.

[3] At first instance, the Refugee Protection Division (the "RPD") dismissed all their claims. On appeal to the RAD, with new evidence, Ms Olobor succeeded. She is a Convention Refugee.

[4] Mr Olobor and the two sons claimed that they too would be persecuted. The RAD disagreed. The RAD concluded that there was insufficient evidence that Mr Olobor had a subjective fear of persecution. The RAD found insufficient evidence that Mr Olobor faced a serious possibility of persecution under section 96 or a likelihood of harm under subsection 97(1) either from his extended family or from the police. The same was true for David. Daniel is a dual citizen of Nigeria and the United States but made no claim against the United States, so the RAD dismissed his claims.

[5] In this Court, the applicants submitted that the RAD erred by failing to conclude that Mr Olobor had valid claims. They maintain that the evidence demonstrates that members of Mr Olobor's extended family and the police would come after them in Nigeria, just as they would persecute Ms Olobor. They also argue that police would pursue Mr Olobor because he had

provided material support to a perceived member of the LGBTQ+ community, which is an offence under a Nigerian statute.

[6] In my opinion, the application must be dismissed. The RAD did not make a reviewable error as described by the Supreme Court in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65. First, the RAD did not make a reviewable error as to whether the applicants were entitled to protection as family members of a successful Convention refugee claimant. The RAD's conclusion about the persecution of Ms Oloror did not concern the family as a social group. The RAD found that Mr Oloror did not provide sufficient evidence of his subjective fear of his extended family or the police to support his claim. Second, the RAD's decision cannot be set aside on the basis that it did not grapple with a central argument made to it by the applicants. The applicants did not make specific submissions to the RAD about persecution by police while enforcing a statutory offence of providing material support to a perceived member of the LGBTQ+ community. The RAD did consider a similar point about aiding and abetting, and concluded on the evidence that Mr Oloror would not be pursued and mistreated by police should he return to Nigeria.

I. Facts and Events Leading to this Application

[7] The applicants are citizens of Nigeria. Daniel Oloror is also a citizen of the United States.

[8] On February 15, 2018, the applicants and Ms Oloror left Nigeria for the United States. They arrived in Canada on February 17, 2018.

[9] The family all made claims for protection under section 96 and subsection 97(1) of the *IRPA*.

[10] On June 25, 2019, the RPD dismissed their claims.

[11] They appealed to the RAD and introduced new evidence. The RAD admitted all the new evidence. It was decisive in persuading the RAD to conclude that Ms Olobor was a Convention refugee.

A. ***The RAD's Decision***

[12] The RAD first set out the allegations made by Ms Olobor (referred to as Mrs. Olobor in the decision):

Following a disagreement in 2016 with a friend who owed her money, the friend told [Mr Olobor's] Extended Family that Mrs. Olobor was cheating on her husband, and had done so throughout her marriage. The Extended Family subsequently called a family meeting in November 2016, and Mrs. Olobor was told at that meeting that she was required to undergo rituals which involved cutting her skin and a second circumcision. Mrs. Olobor did not wish to undergo these rituals. Mr. Olobor supported her. Mrs. Olobor did not present herself for the rituals. The Extended Family believe, after consulting an oracle, that Mrs. Olobor is the cause of a number of misfortunes that have occurred in the family, including the death of a family member. The Extended Family have never accepted Mrs. Olobor as Mr. Olobor's wife, and have insisted that Mr. Olobor should marry someone else.

[13] Two months after the family meeting, the Olobor family fled to Ibadan. A year later, they arrived in Canada through the United States. After their arrival in Canada, Mrs. Olobor's brother

informed them that members of Mr Oloror's extended family had decided that Ms Oloror must be a lesbian and informed the Nigerian police. The police then detained Ms Oloror's brother and mother for several hours, in hopes of finding Ms Oloror.

(1) Ms Oloror's Claim

[14] The RAD concluded that Ms Oloror was a Convention refugee because of events that occurred after she came to Canada. Specifically, Mr Oloror's extended family reported her to the Nigerian authorities as being a lesbian. The RAD found it is a criminal offense to be gay in Nigeria and the Nigerian police were pursuing Ms Oloror as a result. The RAD concluded that Ms Oloror had a connection or nexus to a Convention ground because of her membership in a particular social group, at least in the minds of members of Mr Oloror's extended family and the Nigerian police as the agents of persecution.

[15] In the RAD's view, Ms Oloror had a subjective fear of persecution by the police because of her brother's and mother's detention by the police, to aid their attempt to find her. Ms Oloror's brother provided an affidavit advising that he and their mother were detained a second time. They were accused of aiding and abetting the commission of a criminal offence. Her brother sought legal advice when he was served with an invitation to attend the police station. His lawyer attended the police station and provided bail for both of them. The evidence included the invitation to attend and a notarized letter from the lawyer explaining and confirming his/her involvement. The RAD found that the country condition evidence demonstrated that criminalization and persecutory treatment of lesbian women by the state occurs throughout Nigeria.

[16] The RAD also concluded that there was an objective basis for Ms Oloror's fear of persecution. The RAD found that being a lesbian is a criminal offence in Nigeria, punishable by a long sentence in prison. The police have searched for her. While Ms Oloror maintained she is not a lesbian, the RAD concluded there was a serious possibility she would be persecuted in any event. The police had been advised that she was not and continued to pursue her. Based on the wealth and political influence of a member of Mr Oloror's extended family who lodged the criminal complaint, the RAD held that the police would continue to pursue the criminal complaint, which would lead to the arrest and persecution of Ms Oloror if she were to return to Nigeria. Because the Nigerian police were involved, the RAD held that Ms Oloror would not receive state protection and there was no internal flight alternative.

(2) Mr Oloror's Claim

[17] The RAD concluded that Mr Oloror did not have a subjective fear of persecution and that there was no objective basis for a future-looking risk of persecution under IRPA section 96 or harm under subsection 97(1). The RAD found that it did not have sufficient evidence that Mr Oloror was afraid of the extended family, the police or anyone else in Nigeria (either directly or by inference).

[18] Mr Oloror did not testify before the RPD. He adopted his wife's Basis of Claim. Therefore, there was no direct evidence from Mr Oloror of his subjective fear. The RAD also declined to infer such a fear on the remainder of the evidence. The RAD found that Ms Oloror was the focus of the persecution by the members of Mr Oloror's extended family, not Mr Oloror.

[19] The RAD assessed the evidence of an objective basis for Mr Oloror's claim under *IRPA* section 96 and subsection 97(1). The RAD concluded that the evidence did not establish that it was more likely than not that he would face a risk to life, a risk of cruel and unusual treatment or punishment, or a danger of torture if he returned to Nigeria.

[20] There were two threats or risks at issue. First, the evidence did not persuade the RAD that Mr Oloror faced a serious possibility of being forced to marry against his will if he returned to Nigeria. The wishes/threats from his family had been ongoing since 2011 and he had not been forced to marry against his will.

[21] Second, the RAD considered possible criminal accusations being made against him. While accusations were made to the police against his wife, no accusations had been made to the police against Mr Oloror.

[22] With respect to an accusation of aiding and abetting his wife's Nigerian crime, the RAD found insufficient evidence to establish that Mr Oloror would be pursued and mistreated by the police if he were to return to Nigeria.

(3) The Sons' Claims

[23] The RAD considered possible persecution or harm faced by the older son, David. The RAD held that there was also no evidence that he faced either one. No threats had been made in relation to David and the police had showed no interest in him for aiding or abetting a crime. Indeed, no argument had been made on appeal to that effect.

[24] Because Daniel is both a Nigerian and an American citizen, the RAD held that Daniel had to establish persecution or harm in each country of citizenship. He made no such claim against the United States, so his claim for protection was not sustained.

[25] On this application, the applicants seek judicial review of the RAD's decision.

II. Standard of Review

[26] The standard of review of the RAD's decision is reasonableness, as described in *Vavilov*. The onus is on the applicant to demonstrate that the decision is unreasonable: *Vavilov*, at paras 75 and 100.

[27] Reasonableness review entails a sensitive and respectful, but robust, evaluation of administrative decisions: *Vavilov*, at paras 12-13. The starting point is the reasons provided by the decision maker, which must be read holistically and contextually and in conjunction with the record that was before the decision maker: *Vavilov*, at paras 84, 91-96, 97, and 103; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, at para 31.

[28] The court's review considers both the reasoning process and the outcome: *Vavilov*, at paras 83 and 86. A reasonable decision is based on an internally coherent and a rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker: *Vavilov*, at paras 85 and 99.

III. Analysis

A. *Did the RAD make a reviewable error by failing to consider the “derivative” risk to the applicants?*

[29] The applicants submitted that the RAD failed to determine “derivatively” whether they would be targeted for persecution because of their affiliation with Ms Oloror, whom the Nigerian police and extended family perceive to be a lesbian. Although they made no specific submissions on how David and Daniel might face persecution, they submitted that Mr Oloror qualified for *IRPA* protection. They pointed to country condition evidence showing that police in Nigeria target and detain the family members of wanted persons suspected to be LGBTQ+ (as Ms Oloror’s mother and brother experienced). They referred to evidence suggesting that police would pursue both adults. In addition, they argued that the police might well attempt to pressure him or try to locate him in order to find and persecute his wife.

[30] The applicants referred to evidence in the record that police were looking for both adults, including in Ms Oloror’s brother’s affidavit. He testified that the police told him that they had been informed that the brother “knew the whereabouts of Iyabo Oloror and her family” (underlining added). Similarly, the notarized letter from the lawyer, mentioned above, confirmed that the police requested the brother and mother’s presence in order to “elicit the whereabouts of the suspect Iyabo Oloror with her family who were at large” (underlining added).

[31] With respect to persecution by the extended family members, the applicants emphasized that Mr Oloror had stood with his wife, against his extended family, when they made

accusations against her and wanted to perform certain unacceptable rites and physically harm her. The applicants noted that they left Nigeria after a cousin saw Mr Oloror in the new town where they lived (Ibadan) after departing their previous home in Benin City. This demonstrated how the risks faced by the applicants were all faced together and cannot be separated, as the RAD's conclusion would imply. The family believed that Mr Oloror was hiding his wife and would pursue them both. The applicants argued that the RAD did not give sufficient consideration to their spousal and family relationship, citing *Granada v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1766; *Ndegwa v Canada (Minister of Citizenship and Immigration)*, 2006 FC 847; and *Corneille v Canada (Minister of Citizenship and Immigration)*, 2014 FC 901.

[32] In *Granada*, Justice Martineau held that family can be considered as a social group (a recognized ground for Convention refugee status), but only in cases where there is evidence that the persecution is taking place against family members as a social group: *Granada*, at para 16.

[33] At the hearing, the applicants relied on the following passage from Justice Mosley's reasons in *Ndegwa*:

[8] The law requires that a refugee claimant show that there is a personal nexus between him and the alleged persecution based on one of the Convention refugee grounds. Thus, indirect persecution is not a solid foundation for a Convention refugee claim: *Pour-Shariati v. Canada (Minister of Employment and Immigration)* (1997), 215 N.R. 174, 39 Imm. L.R. (2d) 103 (C.A.) [*Pour-Shariati*]; *Granada v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1766, [2004] F.C.J. No. 2164 (QL).

[9] That the family is a valid social group for the purposes of seeking refugee protection is well established. Where membership in a family group is the basis for the claim, a personal nexus must be established between the claimant and the alleged persecution on

Convention grounds: *Pour-Shariati*. It is not enough to point to the persecution suffered by family members if it is unlikely to affect the claimant directly. In this case, there was a sufficient nexus between the applicant's claim and his wife and daughter's persecution. The applicant is the husband and father of the women and therefore he would directly be at risk resulting from the decision not to allow his daughter's circumcision.

[10] In this case the Board member erred by not considering whether the applicant would be persecuted as a member of his family. While indirect persecution is not sufficient to ground a claim for refugee protection, in this case the member should have considered the applicant's membership in the family as something giving rise to a risk of persecution.

[34] In *Corneille*, Justice O'Reilly allowed the application for judicial review because the decision-maker had not properly considered an 8-year-old's evidence of possible treatment owing to his mother's sexual orientation independently from his mother's claims: *Corneille*, at paras 3, 10 and 11.

[35] The respondent did not actively contest the legal principles applicable to the RAD's consideration of a "derivative" claim for the applicants, but submitted that this case was about the onus on the applicants and the insufficiency of the evidence. On the onus, the respondent submitted that facts must be proven on a balance of probabilities and then weighed against the legal tests under sections 96 and 97.

[36] The respondent referred extensively to the RAD's assessment of the evidence and reasoning on both Mr Olobor's alleged subjective fear and on the objective basis under section 96 and subsection 97(1). Referring to the insufficiency of the evidence, the respondent noted that

on subjective fear, Mr Oloror did not testify and only adopted his wife's Basis of Claim form. He did not adopt her oral testimony before the RPD.

[37] The respondent also pointed to examples in the evidence that pointed only to Ms Oloror being a target of persecution. A filed statement from Ms Oloror's brother dated January 23, 2019 stated that the police advised during his interrogation that they were conducting a thorough search for Ms Oloror "and her family wherever they are hiding in order to bring her to face the law" [underlining added].

[38] In my view, the applicants have not shown that the RAD made a reviewable error.

[39] The fact that one family member has been or will be persecuted does not confer refugee status on all of the other members of that family. In other words, there is no concept of indirect persecution in Canadian refugee law: *Theodore v Canada (Citizenship and Immigration)*, 2021 FC 651 (Roussel J.), at para 8; *Ramirez Estrada v Canada (Citizenship and Immigration)*, 2015 FC 1019 (LeBlanc J.), at para 8. If membership in a family group is the basis for an individual's claim, a personal nexus must be established between the claimant and the alleged persecution on Convention grounds: *Ndegwa*, at paras 8-9.

[40] In the present case, the RAD found persecution of Ms Oloror by Mr Oloror's extended family and the Nigerian police because of the allegation that she is a lesbian, a criminal offence in Nigeria punishable by up to 14 years imprisonment – a punishment the RAD concluded was itself persecutory. The persecution of Ms Oloror as concluded by the RAD did not concern the

family as social group, and the events in Nigeria giving rise to the persecution principally concerned Ms Oloror as a targeted individual. The RAD found that Mr Oloror's family was the source of the complaint to the police and that the family members did not seek to make him the target of the police. The RAD found that "[a]ll of the evidence" before it suggested that it was Ms Oloror "who is despised by the Extended Family, and that it is she that is being pursued by the Nigerian police at the behest of the Extended Family ...". The RAD dismissed the separate concerns about persecution of Mr Oloror individually.

[41] In addition, and critically for the disposition of this application, the RAD found that the basis for dismissing Mr Oloror's claim was that he had not provided sufficient evidence of his own subjective fear of his family members, the police, or anyone in Nigeria. The RAD found no direct evidence to support his claim of subjective fear and declined to infer it from the remaining evidence. A letter threatening both Ms Oloror and Mr Oloror did not establish a subjective fear because Mr Oloror did not testify about it.

[42] The two successful judicial review decisions to which the applicant referred are different from the present case because in those cases, the decision-maker failed to consider the impact of the successful claim on the applicants' own claims for protection: see *Ndegwa*, at paras 9-10, and *Corneille*, at para 11. In this case, the RAD considered Mr Oloror's claim, including the impact of the evidence related to Ms Oloror's claim.

[43] While the parties made extensive reference to the evidence at the hearing in this Court, a reviewing court cannot engage in the debate about whether the evidence supports the conclusion

that the extended family and the Nigerian police were pursuing Ms Oloror, or were pursuing all of Ms Oloror's family, including Mr Oloror and their sons, as a group. To do so would go down the road of impermissibly re-weighing the evidence: *Vavilov*, at para 125.

[44] Lastly, the applicant has not shown that the RAD misapprehended or ignored the evidence. The applicants did not identify critical facts that were not considered by the RAD. See *Vavilov*, at para 126; *Federal Courts Act*, paragraph 18.1(4)(d).

[45] Accordingly, I conclude that the RAD did not commit a reviewable error in its consideration of the evidence related to Mr Oloror's claim for protection.

B. *Did the RAD fail to grapple with a central argument made by the applicants?*

[46] At the hearing, the applicants advanced the argument that RAD erred in failing to consider that it was a criminal offence in Nigeria to provide "material support" for a person perceived to be a lesbian or other member of the LCBTQ+ community. They contended that even if Ms Oloror were the "primary target" of the police, Mr Oloror would also be pursued on that basis. The ground in *Vavilov* for a possible reviewable error is whether the RAD failed to grapple with a central position or argument advanced by the applicants, which may lead the Court to lose confidence in the RAD's decision: *Vavilov*, at paras 127-128.

[47] The applicants' written submissions to the RAD focused on Ms Oloror's claims and said little about the specific or derivative claims of Mr Oloror or the sons. The written submissions did not make the point now being made by the applicants in this Court about Mr Oloror

providing “material support” to a perceived member of the LGBTQ+ community. I am unable to conclude that this specific argument was so central to the applicants’ submissions to the RAD to require the RAD to address it in detail as contemplated by *Vavilov*, at paragraph 128.

[48] The RAD did, however, consider and reject an argument about aiding and abetting, which in this case is similar to the “material support” submission made to this Court. The RAD concluded:

Should Mr. Olobor return to Nigeria, he could be seen as aiding and abetting Mrs. Olobor's crime, which is what the police accused Mrs. Olobor's brother and mother of doing. However, given the complaint has been made by Mr. Olobor's uncle, who is a political figure, and that it is so plainly directed at Mrs. Olobor, and given all of the evidence in front of me is directed towards showing the risks facing Mrs. Olobor and the desire of the Extended Family to reclaim Mr. Olobor, I find that there is insufficient evidence to establish, either as a serious possibility or on a balance of probabilities, that Mr. Olobor will be pursued and mistreated by police should he return to Nigeria.

[49] Applying the principles in *Vavilov*, I find no reviewable error by the RAD.

IV. Conclusion

[50] I conclude that the applicants have not demonstrated that the RAD’s decision should be set aside under *Vavilov* principles. The RAD’s decision was based on an internally coherent and a rational chain of analysis and was justified in relation to the facts and applicable law.

[51] The application is therefore dismissed. Neither party proposed a question for certification.

JUDGMENT in IMM-2062-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. No question is certified for appeal under paragraph 74(d) of the *Immigration and Refugee Protection Act*.

"Andrew D. Little"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2062-20

STYLE OF CAUSE: ISAAC FAVOUR OLOBOR, DANIEL ELOGHOSA
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CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: APRIL 27, 2021

**REASONS FOR JUDGMENT
AND JUDGMENT:** A.D. LITTLE J.

DATED: OCTOBER 29, 2021

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