Federal Court Cour fédérale

Date: 20211126

Docket: IMM-1190-21

Citation: 2021 FC 1308

Ottawa, Ontario, November 26, 2021

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

EKUNDAYO SULAIMAN OLORI
OLUWATOYIN FELICIA OLORI
GBOLAHAN SHERIFF OLORI
OLUWAJUWON HABBEB OLORI
BOLUWATIFE ABDULLAHI OLORI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Ekundayo Sulaiman Olori is a 46-year-old citizen of Nigeria. Mr. Olori, his wife, Oluwatoyin Felicia Olori, and his three children seek judicial review of a decision of the Refugee Appeal Division [RAD] dated February 10, 2021, confirming an earlier decision of the Refugee

Protection Division [RPD] dated April 9, 2020, which rejected their claim for refugee protection on account of the Applicants having a reasonable internal flight alternative [IFA] in Port Harcourt, Nigeria, where the agents of persecution would have neither the means nor the motivation to pursue the Applicants and where relocation would not be unreasonable and would not impose undue hardship on them.

[2] The Applicants have raised no reviewable error on the part of the RAD. I see nothing unreasonable either in the RAD's decision not to admit the new evidence submitted by the Applicants or in the manner in which the RAD evaluated the prospects of a viable IFA. In addition, the submission that the Applicants would have no choice but to cut themselves off from family members and acquaintances to make certain that their uncles, the agents of persecution, would not discover their whereabouts was not raised before the RAD, and I have not been persuaded that the argument should be allowed to be made before me.

II. Background

[3] After their father passed away in March 2013, Mr. Olori and his older brother became the rightful heirs to their father's estate – three commercial/residential properties in Lagos, Nigeria, each worth the equivalent of about $52,000 – which did not sit well with their three uncles, who targeted the brothers and their mother to gain control of the property. In March 2015, Mr. Olori's brother was killed after being shot in his car. Mr. Olori claims that his uncles hired assassins, who shot his brother, however, there does not seem to be any evidence of that other than his belief. Mr. Olori's mother died in December 2015, allegedly of poisoning; Mr. Olori also

believes, without much independent evidence, that his uncles plotted the poisoning. This left Mr. Olori alone to inherit his father's property.

[4] In March 2016, about three years after her father-in-law's death, Ms. Olori was followed by an unknown individual on two different occasions when she was dropping off her children at school. Being fearful for their lives, Mr. and Ms. Olori took their children and moved to an apartment, then to a hotel. Eventually Ms. Olori and the children moved in with her sister in Lagos, and Mr. Olori went to stay with friends, awaiting the United States [U.S.] visitor visas for which they had applied. About a year after the incidents involving Ms. Olori and the children, in April 2017, Mr. Olori and his family left Nigeria for the U.S.

[5] A couple of days after arriving in the U.S., Mr. Olori learned that an unidentified individual had broken in to their apartment in Lagos. They did not claim refugee protection in the U.S. because they heard that people who request asylum "get denied". Also, in her narrative, Ms. Olori stated that the family saw no future in the U.S. after living there for two years and, given the increased hostility towards immigrants during the Trump administration, the family decided, after living in Dallas for about two years, to move to Canada in the hopes of finding a better life. Mr. Olori and his family entered Canada on April 16, 2019 and claimed refugee protection.

III. Decision of the RPD

[6] In his Basis of Claim Form, Mr. Olori stated that "[a]t this point, I have not been in charge of my father's property because my uncles never gave me any of the documents needed. I

am not interested in it either, my priority is to have our family safe." During his interview, Mr. Olori indicated that as he is the heir to his father's estate, as long as he is alive, his life continues to be in danger because his uncles will continue to be concerned that he will one day claim his inheritance. Again, Mr. Olori stated that since coming to Canada, he has not been involved in the properties and does not know of their status, however, went on to say that if he were to return to Nigeria, he would retain lawyers and pursue his rights to his father's estate.

[7] The RPD determined that the fear of persecution and the risk of harm to Mr. Olori and his family is tied to the property dispute with his uncles and his right to inherit his father's property, and although the right to own property is not an inherent human right, the RPD would nonetheless base its analysis "on the claimants'" allegations that they fear persecution or a risk of harm because of the fact that they have not turned over the property to the family. The RPD therefore found that the determinative issue is whether Mr. Olori and his family have a viable IFA.

[8] Regarding the first prong of the test for an IFA set out in *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706, the RPD found that the Applicants did not provide sufficient evidence to establish that Mr. Olori's uncles would have the means or the motivation to find them in Port Harcourt. As to means, the RPD found that the simple fact that the uncles are government employees does not establish that they can use the power of the state to locate the Applicants – no evidence was provided that they can. The RPD also found that:

> . . . after the death of the mother in December, 2015, the agents of harm had plenty of opportunity to pursue the claimants until the claimants' departure for the US in April, 2017. . . . The panel finds that if the family members had the means between December,

> 2015 and April, 2017 and did nothing to pursue the claimants for that period of time while the claimants were in close proximity, it is not reasonable to conclude that the family members would exercise any influence they had by pursuing the claimant to one of the proposed IFA cities . . . after a lapse of time of three years.

[9] As to any motivation to harm the Applicants, the RPD found that Mr. Olori had done nothing to pursue his rights in the properties since leaving Nigeria and has no knowledge as to their status. Any risk to the Applicants is, as stated by Mr. Olori, that "the family members would pursue him there because he would pursue his legal rights to the property by contacting a lawyer." The RPD found that the risk to the Applicants was tethered to the assertion of Mr. Olori's rights to his father's properties, yet the right to own property is not an inherent human right. Consequently, it would not be unreasonable to expect Mr. Olori to abandon his inheritance in order to protect his life and that of his family and if he "continued to do nothing to assert [his] claim to the property in either of the proposed IFA's, that they will not be at risk of harm from the family members."

[10] As to the second prong of the test for an IFA, the RPD acknowledged that it is not easy to relocate to a new environment but that, given the family's background, profile and education, the Applicants had not established that it would be unreasonable for them to relocate to Port Harcourt. In the end, the RPD found the Applicants to have a viable IFA in Port Harcourt and rejected their claim for refugee protection.

IV. Decision under review

[11] On February 10, 2021, the RAD confirmed the RPD's decision. The Applicants attempted to submit new evidence in the form of two affidavits, attaching police reports which mostly repeat the evidence in the affidavits, and argued that the new evidence was admissible as it was relevant, post-dated the RPD decision, and mentioned the prospect of relocation to Port Harcourt, and considering that Port Harcourt was only identified as a possible IFA during the RPD hearing, the Applicants did have occasion to present the evidence contradicting the finding that Port Harcourt was a viable IFA.

[12] The RAD declined to admit the new evidence, finding that (1) the contents of the affidavits and documents predate the RPD decision – they describe the murders and the influence of both uncles, which were known and addressed in the RPD decision, (2) the documents were reasonably available to the Applicants at the time of the RPD hearing and no explanation was provided as to why they could not have reasonably been obtained, (3) it was reasonable to expect that the Applicants would have provided such evidence prior to the RPD decision, and (4) although the specific IFA locations were raised for the first time during the hearing before the RPD, it was well-known that the issue of IFAs would be relevant, and it was open to the Applicants to either seek an adjournment to prepare to address the issue or provide post-hearing evidence and submissions.

[13] As to the finding by the RPD of a viable IFA in Port Harcourt, the Applicants argued that, in relation to the first prong of the test for an IFA, the RPD erred by failing to properly consider the social and political situation in Port Harcourt, including the risk of kidnappings and

other forms of criminality. In addition, given the influence of the family members outside of Lagos, the Applicants continue to be at risk should Mr. Olori attempt to regain his property.

[14] The RAD found that the Applicants failed to establish that they would be targeted by criminal acts; it also found that the fears they identified concern a generalized risk of crime faced by the population of Nigeria. The RAD agreed with the RPD that the uncles did not have the means or motivation to pursue the Applicants; the fact that the uncles work for the government is not enough to infer that they have the capacity or connections to find and pursue the Applicants. The RAD also agreed with the RPD that it was reasonable to expect Mr. Olori to give up his interests in the property to ensure the safety of the family; doing so would thus eliminate any concern that the uncles would have the motivation to locate and harm them in Port Harcourt.

[15] Second, the Applicants further argued that the RPD erred by simply considering their employment and requirements for shelter and failing to consider the likely decline in their standard of living, lack of opportunities for employment and the fact that they would be constantly living in fear. The RAD agreed with the RPD that Mr. and Ms. Olori were in a favourable position to secure employment. The RAD noted that "the case law does not permit for one's preference or their convenience to be sufficient to meet the objectively unreasonable test for the second prong of IFA analysis" and that it would be illogical for them to choose "a more abundant or 'higher' standard of living in a place they are at risk over a relative decline in standard of living but in a safe place."

[16] On February 22, 2021, Mr. Olori and his family filed for judicial review of the RAD's decision.

V. Issues

[17] Two issues arise from this application for judicial review:

(a) Was the RAD's refusal to admit new evidence reasonable?

(b) Is the RAD's decision reasonable?

VI. Standard of review

[18] The parties accept that the applicable standard of review in this case is reasonableness. I agree.

VII. Analysis

A. *The RAD's decision to refuse to admit the new evidence was reasonable*

[19] The Applicants submitted four documents as new evidence before the RAD:

1. an affidavit from Ms. Olori's father dated July 10, 2020;
2. an affidavit from Mr. Olori's sister-in-law (the widow of Mr. Olori's brother who was killed in March 2015) dated July 7, 2020;
3. a police report dated July 7, 2020; and
4. a police report dated July 10, 2020.

[20] Subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], provides that new evidence may be presented to the RAD in three circumstances: (1) where the evidence arose after the RPD's decision; (2) where the evidence was not reasonably available; and (3) where the person could not reasonably have been expected in the circumstances to have presented the evidence at the time of the rejection of the claim. In addition, new evidence must meet the implicit admissibility criteria set out in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 [*Raza*], and *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 (i.e., the evidence submitted must be credible, relevant and new). The Applicants submit that the RAD did not reasonably assess the first criterion under subsection 110(4) – whether the evidence is new.

[21] For the most part, the affidavits relate facts which were known and addressed by the RPD, including the dispute over the property, the murder of Mr. Olori's brother, and the plight of the Applicants. However, the affidavits also make mention of facts specifically relating to the issue of Port Harcourt as a viable IFA: in particular, the affidavit of Ms. Olori's father gives his opinion on the challenges of life in Port Harcourt, and the affidavit of Mr. Olori's sister-in-law states that she and her deceased husband actually considered moving to Port Harcourt in the past but decided against it on account of the amount of criminal activity in the city.

[22] The Applicants argue that the elements of the evidence dealing specifically with Port Harcourt were not known to them until after the RPD decision and could not have reasonably been expected to have been presented to the RPD until the decision identifying Port Harcourt as a viable IFA was rendered by the RPD. The Applicants cite *Raza* at paragraphs 13 and 16:

[13] As I read paragraph 113(*a*), it is based on the premise that a negative refugee determination by the RPD must be respected by the PRRA officer, unless there is new evidence of facts that might have affected the outcome of the RPD hearing if the evidence had been presented to the RPD. Paragraph 113(*a*) asks a number of questions, some expressly and some by necessary implication, about the proposed new evidence. I summarize those questions as follows:

1. Credibility: Is the evidence credible, considering its source and the circumstances in which it came into existence? If not, the evidence need not be considered.

2. Relevance: Is the evidence relevant to the PRRA application, in the sense that it is capable of proving or disproving a fact that is relevant to the claim for protection? If not, the evidence need not be considered.

3. Newness: Is the evidence new in the sense that it is capable of:

   (a) proving the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing in the RPD, or

   (b) proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or

   (c) contradicting a finding of fact by the RPD (including a credibility finding)?

If not, the evidence need not be considered.

. . .

[16] One of the arguments considered by Justice Mosley in this case is whether a document that came into existence after the RPD hearing is, for that reason alone, “new evidence”. He concluded that the newness of documentary evidence cannot be tested solely by the date on which the document was created. I agree. What is important is the event or circumstance sought to be proved by the documentary evidence.

[23] The Applicants argue that subparagraph 13(3)(b) and paragraph 16 of *Raza*, read together, lead to the conclusion that an event or circumstance which predated the RPD decision would be considered new for the purpose of subsection 110(4) if the event or circumstances was unknown to them at the time of the RPD decision and goes to contradict a finding of the RPD; newness goes to the state of mind of the claimant and relates to what the claimant knew at the time of the decision, not what was reasonably available before the time of the decision.

[24] I cannot agree with the Applicants. As stated by Mr. Justice Annis in *Abdullahi v Canada (Citizenship and Immigration)*, 2016 FC 260:

> [14] I agree with the RAD that the Applicant must put her best foot forward before the RPD, and present all the evidence that is available at the time, whether aware of it or not, unless there is an aspect of injustice arising from unexpected new facts, or old facts that no reasonable amount of due diligence could have turned up. It is not intended to be a tune-up procedure for the RAD that upon learning in deficiencies in the Applicant's case, additional evidence that could have been presented to the RPD may be presented as new evidence before the RAD.
>
> [Emphasis added.]

[25] I see no injustice here, and although possibly new to the Applicants, there is no reason to believe that the evidence of Ms. Olori's father or Mr. Olori's sister-in-law relating to the prospects of living in Port Harcourt could not have been obtained through due diligence on their part prior to the RPD rendering its decision. In any event, the evidence of Ms. Olori's father and Mr. Olori's sister-in-law is consistent with the testimony of Mr. Olori given during his interview before the RPD, including questions from his own counsel, as to what he would expect if he had to relocate to Port Harcourt. I cannot see how the proposed new evidence of Ms. Olori's father

and Mr. Olori's sister-in-law adds anything of substance to the debate and the determination of Port Harcourt as a viable IFA.

[26] The Applicants argue that it is not reasonable to expect evidence on the issue of the viability of an IFA prior to the IFA being identified; in this case Port Harcourt was only confirmed as a viable IFA upon the RPD decision. I cannot agree. The Applicants knew or should have known to expect the issue of viable IFAs to be raised before the RPD; they cannot be said to have been caught off guard. In fact, the narrative of Mr. Olori goes to great lengths to set out why he would supposedly not be safe anywhere in Nigeria.

[27] In any event, the *Refugee Protection Division Rules*, SOR/2012-256 [Rules], provide claimants with an opportunity to either seek an adjournment to prepare to address the issue of an IFA identified during a hearing or submit post-hearing evidence and arguments on the issue prior to the RPD rendering its decision (Rules, sections 43 and 54). If there was anything further to add regarding the identification during the RPD hearing of Port Harcourt as a viable IFA, there is nothing to suggest that it could not have been done prior to the RPD decision; here, nothing was done by the Applicants. Refugee claimants cannot wait until after the RPD has rendered a negative decision to provide such evidence (*Ozomba v Canada (Citizenship and Immigration)*, 2016 FC 1418 at para 18) and it is reasonable to expect a claimant to seek an adjournment or to file post-hearing evidence (*Hassan v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 459 at paras 10, 23-24).

[28] As for the police reports, I accept that they are dated after the RPD decision, however, the reports are simply handwritten renditions of the affidavits and the facts already known to the Applicants at the time of the RPD hearing. It seems to me that the reporting of facts that were known at the time of the RPD decision for the purpose of generating a new document, in this case a police report, does not make the evidence new.

[29] The Applicants further argue that the RAD made an error by only addressing whether the Applicants could not reasonably have been expected in the circumstances to have presented the evidence at the time of the rejection of the claim, without even assessing whether the evidence arose after the RPD's decision. I do not agree with the Applicants. The RAD did consider the issue and found that the evidence did not arise after the RPD's decision:

> Specifically, while the documents are dated July 2020, which is after the rejection of the RPD claim, the content of both affidavits predates the RPD decision by years as the events described in relation to the murders and the influence of both uncles is nothing new as this was discussed by the [Applicants] at the RPD hearing on January 23, 2020.

[30] The RAD then proceeded to assess the remaining two conditions set out in subsection 110(4) of the IRPA: whether the evidence was not reasonably available or whether the Applicants could not reasonably have been expected in the circumstances to have presented the evidence at the time of the rejection of the claim.

[31] I see nothing unreasonable in the manner in which the RAD dealt with the issue of the new evidence.

B. *The RAD's decision is reasonable*

[32] As stated, both the RPD and the RAD determined that the risk to the Applicants was tethered to the pursuit by Mr. Olori of his rights to his father's properties and that given that such a right cannot ground a claim for refugee protection, it would not be unreasonable to expect Mr. Olori to abandon his inheritance in order to protect his life and that of his family. I see nothing unreasonable with that finding (*Kenguruka v Canada (Citizenship and Immigration)*, 2014 FC 895; *Malik v Canada (Citizenship and Immigration)*, 2019 FC 955).

[33] There was some discussion before me as to whether the RAD's consideration of a viable IFA was even necessary under the circumstances, once it had determined that the risk of persecution was tied to an event which was within the control of the Applicants; if the abandonment of Mr. Olori's right to his inheritance meant that the risk of harm from his uncles was mitigated, why consider the issue of a viable IFA when such a determination presupposes that a risk of persecution continues to exist? As "claimants who are able to make reasonable choices and thereby free themselves of a risk of harm must be expected to pursue those options" (*Sanchez v Canada (Citizenship and Immigration)*, 2007 FCA 99 at para 16), this determination alone by the RAD may have been sufficient to dispense with the Appellants' claim.

[34] However, the RPD nonetheless proceeded with basing its analysis on the Applicants' assertion that they fear Mr. Olori's uncles because they have not turned over the property to the family. The RAD took no issue with this approach and, for my part, I see nothing unreasonable in it. It is not for me to rewrite the RAD decision, but rather to assess the reasonableness of the decision and the manner in which the issues were addressed by the RAD.

[35] I had occasion to summarize the test for an IFA in *Feboke v Canada (Citizenship and Immigration)*, 2020 FC 155 at paragraph 15:

> [15] The decisions in *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706, and *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, 1993 CanLII 3011 (FCA), [1994] 1 FC 589, have established a two-prong test to be applied in determining whether there is an IFA: (i) there must be no serious possibility of the individual being persecuted in the IFA area (on the balance of probabilities); and (ii) conditions in the proposed IFA must be such that it would not be unreasonable in all the circumstances for an individual to seek refuge there (*Reci v Canada (Citizenship and Immigration)*, 2016 FC 833 at para 19; *Titcombe v Canada (Citizenship and Immigration)*, 2019 FC 1346 at para 15). Both prongs must be satisfied in order to make a finding that the claimant has an IFA. This two-prong test ensures that Canada complies with international norms regarding IFAs (UNHCR Guidelines at paras 7, 24–30).

[36] First, the Applicants argue that the RAD decision was not reasonable as the RAD did not assess whether the uncles would eventually discover the location of the Applicants if they moved to Port Harcourt. In the Applicants' view, this is a relevant fact that was not considered by the RAD during the assessment of the IFA (*Ng'aya v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1136 at para 14 [*Ng'aya*]; *Lopez Martinez v Canada (Citizenship and Immigration)*, 2010 FC 550 at para 26; *Abbas v Canada (Citizenship and Immigration)*, 2019 FC 1576 at paras 26-29).

[37] The Applicants claim that they would need to remain in hiding if they return to Nigeria in order to avoid their uncles and, therefore, Port Harcourt cannot be considered a viable IFA (*Murillo Taborda v Canada (Citizenship and Immigration)*, 2013 FC 957 at para 35; *Zaytoun v Canada (Citizenship and Immigration)*, 2014 FC 939 at para 16; *Ehondor v Canada (Citizenship*

and Immigration), 2017 FC 1143 at para 19). They further argue that the motivation of the uncles to locate them in Port Harcourt must be assessed from the perspective of the agents of persecution (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 747) and that the RAD wrongly portrayed the uncles as "rational actors".

[38] I cannot agree with the Applicants. There is nothing in the RAD decision to suggest that it considered the uncles as being rational or irrational. It assessed their motivation based upon the evidence. In any event, the suggestion that Mr. Olori's uncles are irrational and would continue to pursue their nephew and his family in Port Harcourt if Mr. Olori abandoned his rights to his father's property is speculative at best. The "issue of personalized risk needs to be assessed against the realistic social and economic situations facing a claimant who is expected to return" (*Ng'aya* at para 14), and this is what the RAD did. As was the case in *Ade-Ogunade v Canada (Citizenship and Immigration)*, 2021 FC 195 [*Ade-Ogunade*], the Applicants have not provided any evidence to suggest that the rest of their family would undermine their safety in the IFA. It was not enough for the Applicants to ask the RAD or this Court to speculate; they needed to provide evidence to support their assertion of the likelihood of their whereabouts being disclosed to the agents of persecution, which they failed to do (*Ade-Ogunade* at para 28).

[39] However, even if a logical inference may be drawn from the evidence that the uncles would eventually discover the whereabouts of the Applicants – of which I am not convinced – there remains the finding that the uncles would not be motivated to pursue the Applicants in the event Mr. Olori did not pursue his claim to his father's property. As I see nothing unreasonable

in the RAD's finding on motivation, the issue of the possible discovery of the Applicants in Port Harcourt becomes somewhat of a red herring.

[40] Finally, the Applicants submit that they would face considerable hardship if they had to live in Port Harcourt as they would have no choice but to cut themselves off from family members and acquaintances to make sure that the uncles do not discover their location. However, this argument was never raised before the RAD; the question of whether separation from family constitutes a hardship that makes an IFA unreasonable is a distinct issue from the issue of whether the Applicants needed to go into hiding to avoid the agents of persecution. In any event, in order to establish that an IFA is unreasonable by reason of undue hardship, the Applicants must meet a very high threshold: "a refugee claimant must establish more than the undue hardship resulting from loss of employment, separation from family, difficulty to find work, and a reduction in the quality of life" (*Haastrup v Canada (Citizenship and Immigration)*, 2020 FC 141 at para 30; *Ade-Ogunade* at paras 27-28). I do not find that the Applicants have met this threshold.

VIII. Conclusion

[41] I would dismiss the application for judicial review.

JUDGMENT in IMM-1190-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There are no questions for certification.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

David Matas	FOR THE APPLICANTS
Alicia Dueck-Read	FOR THE RESPONDENT

SOLICITORS OF RECORD:

David Matas Barrister & Solicitor Winnipeg, Manitoba	FOR THE APPLICANTS
Attorney General of Canada Winnipeg, Manitoba	FOR THE RESPONDENT