Federal Court  Cour fédérale

Date: 20220114

Docket: IMM-4463-20

Citation: 2022 FC 39

Ottawa, Ontario, January 14, 2022

PRESENT: Mr. Justice Gascon

BETWEEN:

OWOYEMI SHARAFA SALAUDEEN

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Owoyemi Sharafa Salaudeen, is a citizen of Nigeria. He is seeking judicial review of a decision rendered in September 2020 [Decision] by the Refugee Appeal Division of the Immigration and Refugee Board of Canada [RAD]. In its Decision, the RAD affirmed the Refugee Protection Division [RPD]'s finding that Mr. Salaudeen is neither a

Convention refugee nor a person in need of protection pursuant to section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. Both the RPD and the RAD concluded that Mr. Salaudeen had a viable internal flight alternative [IFA] available to him in Nigeria.

[2] Mr. Salaudeen submits that the RPD and the RAD breached the principles of natural justice by failing to protect Mr. Salaudeen's right to present his case and by failing to safeguard a fair process and act in accordance with the objectives of subsection 3(2) of the IRPA. He also contends that the RAD committed a reviewable error by refusing his refugee claim solely on the basis that he could not provide documentary evidence to support his credible testimony. Mr. Salaudeen asks the Court to set aside the Decision and to return it to the RAD for redetermination by a differently constituted panel.

[3] After examining the evidence before the RAD and the applicable law, I find no reason to overturn the Decision. I am satisfied that the RAD's conclusion not to give refugee protection to Mr. Salaudeen on the basis of several viable IFAs in Nigeria was reasonable. I further find that no breach of any principles of natural justice was committed by the RAD in its handling of this case. There are no grounds to justify the Court's intervention, and I must therefore dismiss Mr. Salaudeen's application for judicial review.

II. Background

A. *The factual context*

[4] Mr. Salaudeen was born in April 1979 and was a resident of Lagos, the largest city in Nigeria. He holds a university degree in chemical engineering.

[5] In April 2017, Mr. Salaudeen travelled to his village, Ofa. While he was there, he witnessed the ritualistic practices of the Egun Alagbo Traditionalist People [Alagbo], a group who allegedly practice human sacrifices for blood and body parts. Mr. Salaudeen refused to participate in these rituals, and decided to leave Ofa. He returned to Lagos the day after this event.

[6] In May 2017, members of the Alagbo allegedly showed up at Mr. Salaudeen's Lagos house and threatened to kill him if he did not return to Ofa. On June 2, 2017, Mr. Salaudeen fled Nigeria for the United States due to his fear of the Alagbo. He stayed there for 66 days but did not seek refugee protection. In August 2017, Mr. Salaudeen arrived in Canada and submitted a claim for refugee protection about a month later. The RPD heard Mr. Salaudeen's claim on May 3, 2019, and dismissed his application on May 8, 2019. Mr. Salaudeen appealed the RPD's refusal to the RAD.

B. *The Decision*

[7] The RAD dismissed Mr. Salaudeen's appeal for the following reasons: (i) the RPD's hearing and decision did not give rise to issues of procedural fairness; and (ii) the RPD was correct in finding that Mr. Salaudeen was not a Convention refugee or a person in need of protection due to the existence of viable IFAs in Nigeria.

[8] Before the RAD, Mr. Salaudeen submitted that the hearing before the RPD had been very short in length, and that such a short length was due to the greater probability for Nigerian refugee claimants of seeing their claims rejected based on policy considerations. The RAD disagreed and found that Mr. Salaudeen had simply provided no evidence to support his claim, and concluded that it had no merit. The RAD acknowledged that Mr. Salaudeen's hearing before the RPD had been relatively short indeed, but that it was commensurate with the dearth of detail provided by Mr. Salaudeen in his Basis of Claim and the lack of complexity of his case. The RAD further observed that Mr. Salaudeen's legal counsel decided not to question her client during the RPD hearing. The RAD reviewed Mr. Salaudeen's record as well as the audio recording of the RPD hearing, and found no evidence of a breach of procedural fairness.

[9] Turning to the IFAs, the RAD detailed the well recognized two-pronged test set out in *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (FCA) [*Rasaratnam*], and assessed how the RPD applied it to Mr. Salaudeen's circumstances. In its analysis of the first prong of the test, the RAD found that the RPD was correct to determine that Mr. Salaudeen did not show, on a balance of probabilities, that the proposed IFAs were locations

posing a serious possibility of persecution for him. Mr. Salaudeen argued that the Alagbo had the ability to track him throughout Nigeria and that the group would not lose interest in him over time. He also justified his lack of evidence about the Alagbo's practices and influence in Nigeria on the basis that this group was not known for its openness. However, the RAD concluded that this latter factor was "also indicative of the localized nature of the Alagbo in Ofa, and/or Quara State in Nigeria, making it unlikely for them to be able to locate [Mr. Salaudeen] in the proposed IFAs." The RAD further determined that the absence of evidence of the Alagbo's influence and capability throughout Nigeria meant "evidence of absence" of such influence and capability. In short, said the RAD, Mr. Salaudeen had submitted insufficient evidence to demonstrate that there was a serious possibility that the Alagbo could persecute him in the proposed IFAs, and thus fell short of meeting the requirements of the first prong of the IFA test.

[10] The RAD further found that the RPD was correct in its analysis of the second prong of the IFA test. Mr. Salaudeen did not dispute the fact that the proposed IFAs were not objectively unreasonable or unduly harsh for his circumstances, but argued that the RPD had incorrectly relied on his personal profile and characteristics to decide his refugee claim. Indeed, Mr. Salaudeen asserted that "the status, finances, intelligence or education of a refugee claimant should never be used to deny refugee status because it indicates that a refugee claimant who is poor, uneducated, illiterate and immobile has a better chance at being accepted as a refugee." The RAD disagreed and explained that the use of the personal profile and characteristics of a refugee claimant in the context of an IFA determination is well settled in Canadian jurisprudence. The RAD concluded that Mr. Salaudeen did not fulfil the requirements of the second prong of the IFA test, and that the proposed IFAs were viable.

C. *The standard of review*

[11] Since *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the analytical framework for judicial review of the merits of an administrative decision is now based on a presumption that the standard of reasonableness is applicable in all cases (*Vavilov* at para 16). This presumption can only be rebutted in two types of situations. The first is where the legislature has prescribed the applicable standard of review or provided a mechanism for appealing the administrative decision to a court of law; the second is where the issue under review falls into one of the categories of issues for which the rule of law requires review on the standard of correctness (*Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*] at para 27; *Vavilov* at paras 10, 17). None of the situations justifying a departure from the presumption of reasonableness review applies in this case.

[12] Where the applicable standard of review is reasonableness, the role of a reviewing court is to examine the reasons given by the administrative decision maker and determine whether the 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; *Canada Post* at paras 2, 31). The reviewing court must consider "the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified" (*Vavilov* at para 15). The reviewing court must therefore consider "whether the decision bears the hallmarks of reasonableness—justification, transparency and intelligibility—and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99, citing *Dunsmuir v New Brunswick*, 2008 SCC 9

[*Dunsmuir*] at paras 47, 74, and *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at para 13).

[13] It is not enough that the decision is justifiable. In cases where reasons are required, the decision "must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies" (*Vavilov* at para 86). Therefore, a review under the reasonableness standard is concerned with both the outcome of the decision and the reasoning process that led to that outcome (*Vavilov* at para 87). I note that this approach is consistent with *Dunsmuir*, which held that judicial review should focus on both the result and the process (*Dunsmuir* at paras 27, 47–49). That said, the reviewing court must focus on the actual decision made by the administrative decision maker, including his or her rationale, and not on the conclusion that the Court itself would have reached had it been in the shoes of the decision maker.

[14] Turning to procedural fairness, *Vavilov* did not deal directly with this issue, and the approach to be taken on this front has therefore not been modified (*Vavilov* at para 23). It has typically been held that correctness is the applicable standard of review for determining whether a decision maker complies with the duty of procedural fairness and the principles of fundamental justice (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Heiltsuk Horizon Maritime Services Ltd v Atlantic Towing Limited*, 2021 FCA 26 at para 107).

[15] However, the Federal Court of Appeal has affirmed that questions of procedural fairness are not truly decided according to any particular standard of review. Rather, it is a legal question

for the reviewing courts, which must be satisfied that procedural fairness has been met. When the duty of an administrative decision maker to act fairly is questioned or a breach of fundamental justice is invoked, it requires the reviewing courts to verify whether the procedure was fair having regard to all of the circumstances (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35; *Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para 14; *Canadian Airport Workers Union v International Association of Machinists and Aerospace Workers*, 2019 FCA 263 at paras 24– 25; *Perez v Hull*, 2019 FCA 238 at para 18; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*CPR*] at para 54). This assessment includes the five, non-exhaustive contextual factors set out by the SCC in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] (*Vavilov* at para 77). Those factors are: (i) the nature of the decision being made and the decision-making process followed by the public body in making it; (ii) the nature of the statutory scheme and the terms of the statute pursuant to which the public body operates; (iii) the importance of the decision to the individual or individuals affected; (iv) the legitimate expectations of the person challenging the decision; and (v) the choices of procedure made by the public body itself, and the nature of the deference accorded to it (*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48 at para 5; *Baker* at paras 23–28).

[16] It is up to the reviewing courts to make that determination and, in conducting this exercise, the courts are called upon to ask, “with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed” (*CPR* at para 54). Therefore, the ultimate question raised when procedural fairness and

alleged breaches of fundamental justice are the object of an application for judicial review is not so much whether the decision was "correct." It is rather whether, taking into account the particular context and circumstances at issue, the process followed by the decision maker was fair and offered the affected parties a right to be heard and a full and fair opportunity to know the case they have to meet and to respond to it (*CPR* at para 56; *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at paras 51–54). No deference is owed to administrative decision makers on matters raising procedural fairness concerns.

III. Analysis

A. *No breach of the principles of natural justice*

[17] Mr. Salaudeen argues that the RAD (and the RPD) contravened the principles of natural justice by taking advantage of him. Mr. Salaudeen submits that he was a vulnerable and uninformed refugee claimant represented by incompetent legal counsel. In his eyes, the RAD should have intervened to protect his rights and made an error in law by failing to safeguard a fair process and to act in accordance with the overarching objectives of subsection 3(2) of the IRPA. Mr. Salaudeen claims that his counsel before the RPD did not speak nor understand English, which was the language requested for the hearing on his Basis of Claim. He further submits that the short length of the hearing before the RPD was due to his counsel's incompetence.

[18] Mr. Salaudeen contends that, by allowing such a situation to unfold without intervening, the RPD contravened the objectives listed at subsection 3(2) of the IRPA, and that the RAD did

the same by confirming the RPD's decision and dismissing the appeal. Mr. Salaudeen contends that his counsel before the RAD failed to address the matter of "inadequate representation" in his memorandum.

[19] I find Mr. Salaudeen's arguments unconvincing.

[20] First, I agree with the Minister that Mr. Salaudeen cannot ground his judicial review application on concerns of procedural fairness, because such concerns regarding the RPD hearing were not raised in his appeal before the RAD. The general rule is that reviewing courts should "not hear arguments attacking the decision of the RPD that could have been but were not raised before the RAD" (*Khan v Canada (Citizenship and Immigration)*, 2020 FC 1101 [*Khan*] at para 27; *Oluwo v Canada (Citizenship and Immigration)*, 2020 FC 760 at paras 54, 59; *Saint Paul v Canada (Citizenship and Immigration)*, 2020 FC 493 at para 39). This rule is consistent with the limited scope of a reviewing court's authority and the deference it must give to administrative decision makers. In addition, raising an issue for the first time at the judicial review stage may unfairly prejudice the respondent and may prevent the reviewing court from fully assessing the evidence that was submitted and heard at the administrative level (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22–26).

[21] Second, Mr. Salaudeen provided no evidence that he had notified his former counsel of his allegation of counsel incompetence. Such notification is a requisite condition to ground an application for judicial review on counsel incompetence (*Tapia Fernandez v Canada*

(Citizenship and Immigration), 2020 FC 889 at para 22). In the same vein, Mr. Salaudeen did not follow the well-accepted protocol governing matters of counsel incompetence before this Court. This is sufficient to dismiss his claim that the Decision should be set aside on the basis of counsel incompetence.

[22] I would add that the objectives of the Act set out in subsection 3(2) of the IRPA does not confer to the RPD or the RAD a duty to help and advise an applicant. An administrative decision maker is not required to act as counsel for any litigant, even a self-represented litigant.

[23] Third, a reviewing court will only find a breach of natural justice based on counsel incompetence in extraordinary circumstances, and such breach requires a high evidentiary threshold *(Nagy v Canada (Citizenship and Immigration)*, 2013 FC 640 at para 42; *Memari v Canada (Citizenship and Immigration)*, 2010 FC 1196 at para 3). To support his alleged breach of natural justice argument, Mr. Salaudeen had to prove that his former counsel was incompetent and that a miscarriage of justice (i.e., a prejudice) resulted from that incompetence (*R v GDB*, 2000 SCC 22 at paras 26–27). Mr. Salaudeen was unable to provide any compelling evidence supporting either of these two elements. I underline that the evidence on the record does not support Mr. Salaudeen's contention that his former counsel was unable to communicate in English, and instead points to the contrary in light of the exchanges between Mr. Salaudeen and his counsel throughout his refugee claim process. While English may not have been counsel's maternal language, it certainly cannot be said that Mr. Salaudeen's counsel was illiterate in English and incapable of handling the hearing before the RPD.

B. ***No reviewable error by refusing the refugee claim on the basis of existing IFAs***

[24] Mr. Salaudeen submits that the RAD committed a reviewable error in its analysis of the first prong of the IFA test, where it concluded that the absence of evidence regarding the influence and capability of the Alagbo throughout Nigeria equated to evidence of absence of such influence and capability. He also argues that a refugee claimant is not required to corroborate his or her own version of the facts with documentary evidence, and that the RAD committed an error in law by requiring corroboration. Mr. Salaudeen relies on the fact that the RAD had previously confirmed the RPD's determination that he had testified in a "consistent" manner, meaning that he had given a credible testimony that required no corroboration.

[25] I disagree with Mr. Salaudeen.

[26] As mentioned by the RAD in the Decision, it is well recognized that Mr. Salaudeen bore the burden of proof on the IFA test (*Khan* at para 10; *Akunwa v Canada (Citizenship and Immigration)*, 2020 FC 1179 at para 5; *Manzoor-Ul-Haq v Canada (Citizenship and Immigration)*, 2020 FC 1077 at para 24; *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 (FCA) at para 5). It is also a settled principle of law that the IFA test is one among many questions to answer as part of a refugee protection application (*Rasaratnam* at para 8).

[27] Here, Mr. Salaudeen simply failed to discharge his burden of proof. Based on the scant evidence provided by Mr. Salaudeen, it was reasonable for the Officer to conclude that the

Alagbo had neither the influence nor the capability to persecute Mr. Salaudeen in the proposed IFAs.

[28] In support of its conclusion, the RAD referred to the absence of evidence provided by Mr. Salaudeen on the alleged reach of the Alagbo, on the fact that his wife still lives in Nigeria without any contact with the Alagbo, and on the absence of interest shown by the Alagbo for Mr. Salaudeen. Based on the documentary evidence, I am satisfied that it was open to the RAD to determine that the Alagbo essentially had localized activities and would not have the means, technological or otherwise, to track down Mr. Salaudeen in the identified IFAs. Mr. Salaudeen had the burden to establish that the IFAs designated by the RPD and the RAD were not viable, but his evidence fell well short of that. Mr. Salaudeen was unable to provide convincing evidence that he would be at risk in the designated IFAs.

[29] In sum, Mr. Salaudeen is disagreeing with the RAD's assessment and weighing of the evidence. This does not constitute a sufficient ground for the Court to intervene. Looking at the Decision as a whole, and considering the totality of the evidence, I am not persuaded that the RAD's conclusions on the IFAs were unreasonable.

IV. Conclusion

[30] For the foregoing reasons, the application for judicial review of Mr. Salaudeen is dismissed. I find nothing irrational in the decision-making process followed by the RAD and its findings. Rather, I find that the RAD's analysis bears all the required hallmarks of transparency, reasonableness and intelligibility, and that the Decision is not tainted by any reviewable error. In

all respects, the RAD's reasoning can be followed without encountering any fatal flaws in terms of its rationality or logic.

[31] None of the parties has proposed any question of general importance to be certified, and I agree that none arises.

JUDGMENT in IMM-4463-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed, without costs.

2. No question of general importance is certified.

"Denis Gascon"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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