

Federal Court



Cour fédérale

Date: 20230209

Docket: IMM-7948-21

Citation: 2023 FC 191

Ottawa, Ontario, February 9, 2023

PRESENT: Associate Chief Justice Gagné

BETWEEN:

**PRECIOUS EROMOSELE OKONOFUA and
FLORENCE ONYEKACHUKWU
OKONOFUA**

Applicants

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants are a Nigerian couple whose refugee claim was denied by both the Refugee Protection Division [RPD] and the Refugee Appeal Division [RAD]. The RPD found that the male Applicant had failed to prove his identity, and that the female Applicant had an Internal Flight Alternative [IFA] in the city of Abuja. On appeal, the RAD was satisfied with the

male Applicant's identity but confirmed the RPD's finding with respect to the female Applicant's IFA.

[2] In their written submissions, the Applicants argue that i) the RAD breached its duty of procedural fairness by raising the issue of the IFA with regards to the male Applicant without giving him the opportunity to provide submissions, and; ii) the RAD erred in finding that the Applicants had an IFA in Abuja. At the hearing however, counsel for the Applicants rather emphasized the argument that the RAD's failure to invite submissions from the male Applicant on the second prong of the IFA test amounted to a breach of procedural fairness.

[3] For the reasons that follow, this application for judicial review will be dismissed.

II. Facts

[4] The Applicants claim that in May 2019, the female Applicant's father offered them use of a portion of undeveloped land he owned in Obiaruku, Delta State. When they inspected the land with some workers, an older man approached them and warned them to stay away. Later in the same month, the male Applicant showed the land to a business partner but did not see the older man.

[5] In June 2019, the Applicants came back to their home in Otokutu-Udu (about 1 hour's drive from the land) from running errands to find their security guard bound and gagged in their gatehouse. The guard told them four men had forced him to open the gate at gunpoint, demanded where his "boss" was, and slapped him before binding him and heading into the Applicants'

home. When the Applicants went inside, they found the female Applicant's father dead from what looked to be a gunshot wound to his chest. On the table next to him was a threatening message written in blood warning the Applicants to keep away from the land. The police later took the body away, assured the Applicants they would investigate, and advised them to rest and keep the gate shut tight.

[6] Later that night, the Applicants heard someone rattling the bars in front of their home, and upon looking out saw the gate wide open and two men standing at their front door. The Applicants slipped out the back door with their children and the female Applicant's mother and managed to escape through the open gate, avoiding the men.

[7] The next morning, they all drove to the male Applicant's father in Igueben, Edo State (about four hours drive away). That night, unidentified men came looking for them again and started trying to break down their front door. The female Applicant's mother took the children and ran out the back into a forest. The Applicants escaped shortly afterwards, and heard a gunshot. They later learned that the male Applicant's father, who had stayed behind to delay the intruding men, had been killed. The Applicants were unable to verify that their children escaped unharmed until after they left Nigeria.

[8] The Applicants fled to Lagos by bus, hid there for a few days, and then travelled to New York on US visas they had acquired in 2017 for a planned vacation. Upon arriving in New York, the couple got in an argument and parted ways; the male Applicant went to Atlanta to find work and the female Applicant to Canada via Roxham Road. She claimed refugee protection on

June 18, 2019, and contacted her husband the day after. He joined her in Canada and filed for refugee protection based on the same account.

[9] The male Applicant alleges that while in the United-States, he spoke with his friend Martins Orlu from Lagos police force. On his request, the friend looked into their case and informed the male Applicant that according to his police contacts, the people who were pursuing him and his wife belonged to an organization known as the Black Axe. He told the male Applicant that the Black Axe had powerful connections within the police, that there was no hope of his father and father-in-law's murderers' facing justice, and that it would be best for him and his family to stay out of Nigeria.

[10] In an addendum to their original Basis of Claim narrative, the Applicants allege that in November 2019, the male Applicant's younger brother and some guests stayed in the Applicants' home in Otokutu-Udu, Delta State. In the early hours of November 9, 2019, unknown men attacked the home and set it on fire. The brother and his guests fled the burning house and found their security guard tied up inside the gatehouse and beaten. Before setting the house on fire, the attackers had asked the guard about the Applicants' whereabouts but were told that they were not there. The brother reported the attack to police but the police told him the matter was already under investigation, and demanded a 150,000 Naira bribe to go out and investigate the attack.

III. Decision under review

[11] First, the RAD overturned the RPD's finding regarding the male Applicant's identity.

[12] With respect to the IFA finding, the RAD noted that the Applicants only contested the RDP's finding with respect to the first prong of the test.

[13] The RAD agreed with the RPD that there was no evidence tying the various alleged attacks to each other or to the land the Applicants had received from the female Applicant's father. The RAD found that even if these acts were connected, the Applicants provided insufficient evidence to establish that their agents of persecution were the Black Axe. The RAD reviewed the Applicants' testimony, their narratives, a letter from their lawyer, a letter and documents from the friend in the police, and affidavits from the Applicants' friends and family. The RAD concluded the RPD was correct in determining this evidence did not establish the Applicants' agents of persecution are associated with the Black Axe, or to otherwise establish their identities.

[14] As a result, the RAD found that the Applicants had not demonstrated their agents of persecution had the means or motivation to locate them in Abuja.

[15] The RAD noted the Applicants had not appealed the RPD's finding that Abuja is a reasonable IFA for the female Applicant, nor had they argued Abuja was not a reasonable IFA for the male Applicant. On that last issue, the RAD noted that the RPD did not explicitly consider the IFA in relation to the male Applicant but it found that because the RPD had questioned him about Abuja as an IFA at his hearing, it had been raised as an issue. The RAD noted the male Applicant provided no reasons why it would be unreasonable for him to relocate to Abuja.

[16] The RAD found the RPD's analysis of the second prong of the IFA test regarding the female Applicant applied with some qualifications to the male Applicant. It considered the documentary evidence in the National Documentation Package [NDP]; evidence regarding the male Applicant's education, language skills, and employment prospects; and medical evidence regarding his mental health. Like the RPD, the RAD found that despite generally insufficient mental health resources in Nigeria, Abuja is a reasonable IFA for the male Applicant. Like the RPD, the RAD relied on evidence indicating there are non-profit and charity groups that provide psychological support, including over WhatsApp. The RAD concluded the Applicants had not demonstrated Abuja is an unreasonable IFA.

IV. Issues and Standard of Review

[17] The standard of review of the merits of the decision is reasonableness [*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35]. The issue of procedural fairness — the RAD allegedly raising a new issue on appeal without giving the Applicants a chance to make submissions — is reviewable on a standard akin to that of correctness (*Ojarikre v Canada (Citizenship and Immigration)*, 2015 FC 896 at para 13).

[18] The issues raised in this judicial review application are:

- A. *Did the RAD breach procedural fairness by raising the issue of an IFA for the male Applicant for the first time on appeal without giving him an opportunity to make submissions or by not considering the second prong of the IFA test?*
- B. *Did the RAD reasonably determine Abuja is a valid IFA for the Applicants?*

V. Analysis

A. *Did the RAD breach procedural fairness by raising the issue of an IFA for the male Applicant for the first time on appeal without giving him an opportunity to make submissions or by not considering the second prong of the IFA test?*

[19] The RAD acknowledges that the RPD did not make an IFA finding for the male Applicant — having found that he had not established his identity — in spite of the fact that it had raised the issue for both Applicants, and that the RPD member questioned both Applicants on the subject.

[20] The Applicants argue that in the circumstances, the RAD should at least have sent them a procedural fairness letter, asking for submissions on the IFA issue as it concerns the male Applicant. The RAD's failure to do so, according to the Applicants, amounts to a breach of procedural fairness.

[21] The Applicants further argue that, on the second prong of the IFA test, the analysis made with respect to the female Applicant cannot be transposed to the male Applicant; the latter has little education relative to the former, in addition to having been diagnosed with mental health issues.

[22] Unfortunately, I do not agree with the Applicants.

[23] First, the transcript of the hearing before the RPD shows that at the onset of the hearing, the RPD clearly identified the IFA in Abuja as a determinative issue for both Applicants. The

RPD member tries to ask questions regarding the second prong of the IFA test but the female Applicant keeps on answering that if they relocate to Abuja, they will be found and killed — hence reverting to the first prong of the test. This is the final exchange on the subject:

MEMBER: Is there any other reason that you haven't yet told me about that you...so, is there any other reason that you couldn't live in Abuja, other than the ones you told me about?

ASSOCIATE CLAIMANT: The only other reason is there is no safe or hiding place for me in Nigeria. There is no way that they will not get to me because I will have to go out to work and go to my normal things and they almost get me. There is no way I can hide. That means, if I just go there, I don't think I will be alive to tell the story anymore.

[24] Later, the male Applicant does quite the same:

MEMBER: And your wife told me a bunch of reasons that you would be unable to live in Abuja or Port Harcourt. Do you have anything different to add?

CLAIMANT: What I have to add is that, anywhere, the level of insecurity in Nigeria is number two in the world, the level of insecurity as we speak and the people we are dealing, my wife even does not...she has little knowledge about who the Black Movement is. Now, they...if you...even if you are moving, sleeping in an apartment that is surrounded by policemen, they will still come in and kill you there. So, anywhere as far as Nigeria is concerned, it's a death sentence. Nothing anybody can do about it. It's the system; it's bad, it's porous.

[25] When counsel for the Applicants took his turn asking questions, he did not come back to the IFA issue other than to attempt to clarify the connection between the Applicants' agents of persecution and the Black Axe (first prong of the test). His questions were specifically directed to the male Applicant.

[26] Both Applicants testified that it would not be safe for them to relocate to Abuja (first prong of the test); however, although they both had the opportunity to testify that it would not be reasonable for them to do so (second prong of the test), neither did.

[27] Second and most importantly, in the Applicants submission to the RAD, they assumed the RPD's IFA findings also applied to the male Applicant:

In paragraphs 29-68 of the Reasons for the Decision, the Panel explained its finding that Florence (and **presumably Precious too**) had a viable IFA in Abuja.

The Panel's reasons for finding that the **Appellants** did not satisfy the first prong of the IFA test...

...

It is acknowledged that the only sources for the **Appellants'** information and belief that their agents of persecution...

(emphasis added)

Submissions to the RAD, paras 23-24, 25, CTR, pp 61-62, 64

[28] If the Applicants assumed that the RPD finding applied to both Applicants, it was, in my view, open to the RAD to do the same.

[29] Third, even if the Applicants did not appeal the RPD's finding with respect to the second prong of the IFA test, the RAD still provided its own assessment and found that it would not be unreasonable for the Applicants to relocate to Abuja. With respect to the male Applicant, the RAD considered his education, employability, non-indigeneity, and mental health. Regarding his mental health, the RAD described the psychotherapist's report and noted that there was no evidence the Applicant was on mental health medications. It further noted based on information

in the NDP that accessing mental health care is very challenging in Nigeria but that psychiatric counselling is available for a fee, and that there are also some programs run by non-profits and charity groups that provide psychological support, including over WhatsApp. The RAD thus concluded that the male Applicant could access mental health supports in Abuja.

[30] Finally, in their submissions to the Court, the Applicants do not suggest any arguments they would have made to the RAD in light of the latter's assessment of the issue based on the evidence.

[31] Therefore, I am of the view that the RAD did not raise a new issue regarding the male Applicant; it simply did what it is called upon to do; to review and assess the evidence afresh. In doing so, it did not breach procedural fairness.

B. *Did the RAD reasonably determine Abuja is a valid IFA for the Applicants?*

[32] The IFA test has two prongs:

(a) The Board must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the part of the country to which it finds an IFA exists;

(b) The conditions in the part of the country considered to be an IFA must be such it would not be unreasonable, in all the circumstances, including those particular to the claimants, for them to seek refuge there.

Rasaratnam v Canada (MEI), [1992] 1 FC 706 (CA) at 710;
Thirunavukkarasu v Canada (MEI), [1994] 1 FC 589 (CA) at 596-598;
Diaz Pena v Canada (CIC), 2019 FC 369 at paras 35-36;
Hamdan v Canada (CIC), 2017 FC 643 at paras 11-12.

[33] With respect to the first prong of the test, the RAD assessed the evidence regarding the alleged link between the agents of persecution and the Black Axe and concluded that it was not convincing.

[34] The RAD provided numerous reasons for this conclusion, such as:

- (a) The Applicants testified that neither they nor the associate applicant's father knew the man who approached them, nor did they know the men who attended their home and tied up the security guard;
- (b) There was no evidence to tie the incident at their home or their father's home to the Black Axe;
- (c) A letter from the security guard provided details of the incident on June 1 but did not connect it to the Black Axe;
- (d) Their lawyer wrote a letter to support their application for protection in Canada. The Applicants confirmed that the lawyer had no direct knowledge about the incidents giving rise to their claim for protection. His knowledge was based on what the Applicants told the lawyer;
- (e) Letters from family members were similarly based on information provided by the Applicants;
- (f) An extract from a police crime diary indicates that the father was killed in his home, not the Applicants', and says nothing about the Black Axe;
- (g) The main source of evidence that the perpetrators were the Black Axe was a police officer, who was also a friend, and did not indicate whether the letter was in his professional capacity, nor did he provide his identity card. Further, there was an inconsistency between his evidence and the female Applicant regarding her father's death, and no details were provided as to how he knew the Black Axe were involved.

RAD Decision, CTR, pp 9-14

[35] In my view, this finding falls within the range of reasonable outcomes, is intelligible and is well supported by the evidence.

[36] Having found that the identity of the perpetrators had not been established, it was also reasonable for the RAD to find that the Applicants had not provided sufficient evidence that their agent of persecution had the means and motivation to find them in Abuja.

[37] With respect to the second prong of the test, this Court has explained the threshold to be met by the Applicants in *Hamdan v Canada*, 2017 FC 643 at paras 11-12:

... [T]he threshold for objective unreasonableness is “very high” and “requires nothing less than the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to” the area where a potential IFA has been identified ... Stated differently, objective unreasonableness in this context requires a demonstration that the claimant would “encounter great physical danger or [...] undergo undue hardship in travelling” to the IFA. In addition, “actual and concrete evidence of such conditions” must be adduced by the claimant for refugee protection in Canada ... [citations omitted]

[38] In the case before me, the RAD did review the evidence, including the report provided by the male Applicant’s psychotherapist and the NDP evidence, and concluded that the male Applicant could receive mental health support in his country.

[39] The Applicants have not pointed to any error by the RAD that would warrant this Court’s intervention.

VI. Conclusion

[40] Since I have found that the process before the RAD was procedurally fair and that the RAD did not err in finding that the Applicants had an IFA in Abuja, their Application for judicial review is dismissed.

[41] The parties have proposed no question of general importance for certification and no such question emanates from the facts of this case.

JUDGMENT in IMM-7948-21

THIS COURT'S JUDGMENT is that:

1. The Application for judicial review is dismissed;
2. No question of general importance is certified.

“Jocelyne Gagné”

Associate Chief Justice

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-7948-21

STYLE OF CAUSE: PRECIOUS EROMOSELE OKONOFUA and
FLORENCE ONYEKACHUKWU OKONOFUA v
MINISTER OF CITIZENSHIP AND IMMIGRATION

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