Federal Court  Cour fédérale

Date: 20230606

Docket: IMM-3829-22

Citation: 2023 FC 786

Toronto, Ontario, June 6, 2023

PRESENT: Madam Justice Go

BETWEEN:

Magdalene Imuesemen NWANKWO
Mason Chukwu IFEANYI
Maddison Onyinyechi IFEANYI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. Magdalene Imuesemen Nwankwo [the "Principal Applicant" or "PA"] and her minor children, Mason Chukwu Ifeanyi and Maddison Onyinyechi Ifeanyi [together, the "Applicants"], came to Canada in July 2019 to make refugee claims. They fear persecution in Nigeria from members of the Auchi Indegene Benin Branch [AIB], a financial club, after the PA and her

mother defaulted on a loan to finance a new business set up by the PA's now estranged spouse. They also fear persecution or harm from the family of the PA's spouse, who is also the minor Applicants' father.

[2] The Refugee Protection Division [RPD] rejected the Applicants' claims in December 2021 on credibility grounds, as well as a viable Internal Flight Alternative [IFA] in Port Harcourt. In a decision dated April 4, 2022, the Refugee Appeal Division [RAD] upheld the RPD's determinative credibility findings and confirmed that the Applicants are neither Convention refugees nor persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] [Decision].

[3] The Applicants seek judicial review of the Decision.

[4] For the reasons set out below, I find the Applicants have not established that the Decision was unreasonable and that the RAD breached procedural fairness by failing to provide an opportunity to respond to credibility concerns. As such, I dismiss the application.

II. Preliminary Issue

[5] Before the hearing, I brought to the parties' attention my concern that certain documents contained in the Certified Tribunal Record [CTR] seem to relate to another refugee claimant and likely should not have been included in the CTR. The parties advised the Court that these documents pertain to the claim made by the PA's mother.

[6] At the hearing, I notified the parties of my intention to issue an order redacting the documents relating to the PA's mother's claim. The parties have no objection, save for one document, which was considered by the RAD in the Decision: an affidavit of Mr. Theophilus Okhe, the PA's mother's brother [Okhe Affidavit]. As such, the Okhe Affidavit will not be redacted.

III. Issues and Standard of Review

[7] The arguments raised by the Applicants can be broken down into the following issues:

A. The reasonableness of the Decision, namely,

   i. the RAD's review of the RPD decision;

   ii. the RAD's assessment of the new allegation against the PA's spouse's family;

   iii. the RAD's assessment of the circumstances surrounding the loan agreement; and

   iv. the RAD's substantive assessment of the supporting affidavits.

B. Whether the RAD breached the Applicants' right to procedural fairness in its assessment of the supporting affidavits.

[8] I will apply a reasonableness standard, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, to review the merits of the Decision, including the RAD's application of the law.

[9] A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker: *Vavilov* at para 85. Whether a decision is reasonable depends on the relevant

administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences: *Vavilov* at paras 88-90, 94 and 133-135.

[10] For a decision to be unreasonable, the Applicants must establish the decision contains flaws that are sufficiently central or significant: *Vavilov* at para 100. Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances: *Vavilov* at para 125. Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep": *Vavilov* at para 100.

[11] For issues of procedural fairness, the reviewing Court's role is to determine whether the procedure was fair having regard to all of the circumstances: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35.

IV. Analysis

A. *Was the Decision unreasonable?*

[12] The Applicants raise several arguments with respect to the reasonableness of the Decision, which I will address as follows.

[13] First, the Applicants point out that the RAD agreed that the RPD committed several errors that the Applicants submit were determinative of the RPD's negative credibility findings.

On that basis alone, the Applicants submit the RAD should have granted their claim or sent the matter back for redetermination. I reject this submission. I agree with the Respondent that the Applicants' arguments about the RPD's credibility findings are essentially the same ones raised before and considered by the RAD. The RAD reasonably found that none of the errors was determinative of the appeal. The Applicants' arguments amount to a disagreement with the RAD's weighing of evidence.

[14] Second, the Applicants take issue with how the RAD assessed the RPD's treatment of the allegation regarding the fear of the PA's spouse's family. In an amended Basis of Claim [BOC] narrative that the Applicants submitted before the RPD hearing, the Applicants added that the PA's spouse's family accused her of being a witch. The PA also testified at the RPD hearing that her spouse's father threatened to take her children away from her. The RAD acknowledged that the RPD made some errors in assessing the allegation that the PA would face serious harm in Nigeria from her spouse's family, but ultimately rejected the claim.

[15] The Applicants refer to the RPD's concern that the Applicants raised this allegation "at the eleventh hour", and point to the RAD's reasons distinguishing between the RPD's framing of the issue as a late "introduction" as opposed to a late "submission" of the allegation. The Applicants submit that the RAD relied on a "distinction without a difference" and that both the RPD and RAD unreasonably discounted the PA's explanation for the not disclosing the witchcraft accusations earlier. The Applicants also argue that the RPD and RAD failed to consider any country conditions evidence surrounding witchcraft allegations, citing *Abu v Canada (Citizenship and Immigration)*, 2021 FC 258 at para 23 in support.

[16] I am not persuaded by the Applicants' arguments. The RAD acknowledged that the Applicants submitted an amendment of their claim within the prescribed time limits, and conducted its own analysis of the Applicants' allegations of fear against the father of the minor Applicants and his family. The RAD drew a negative inference from the omission of the threat of the minor Applicants being taken from the PA from the BOC amendment. The RAD also found that the RDP correctly found no additional evidence to substantiate this threat, and noted that counsel did not provide arguments to support the allegation on appeal. As such, the RAD found on a balance of probabilities that the Applicants would not face a personal risk with respect to this claim.

[17] The Applicants have not demonstrated that this finding was made in error. The RAD's distinction between late "introduction" and late "submission" is of no import and does not give rise to a reviewable error. Nor do I find it unreasonable for the RAD to conclude that the Applicants would not face a personal risk in part due to the PA's omission from her BOC narrative her fear that the spouse's family would take her children away from her.

[18] Third, the Applicants take issue with the RAD's central credibility findings surrounding the circumstances of the loan agreement. The RAD drew negative credibility inferences from the PA and her mother's explanations as to whether the lender tried to use legal action to recover the loan, why the lenders did not use the court system to deal with the default, and why the PA and her mother did not ask the authorities for help. The RAD found among other things that the AIB is a legitimate lender and that the security or collateral provisions in the agreement would have ensured a profit from the realization of the collateral.

[19] The RAD took issue with the allegation that the AIB would not want to use the court to enforce the agreement because it would take years. The RAD found that this explanation was inconsistent with the alleged fear of harm, and that to avoid this harm, the Applicants could have avoided court proceedings by signing over the security in the form of properties to the AIB. The RAD then found the central allegation of the claim to be implausible.

[20] Before this Court, the Applicants submit that the RAD's suggestion that they should take "reasonable" steps to let go of their property is fundamentally flawed, as they have no ability to repay the loan for the following reasons:

A. The collateral in question belongs to the PA's ex-husband;

B. The collateral is worth barely 30% of the loan and interest;

C. The agreement does not stipulate for the liquidation of the collateral, rather, it states that the Guarantor would also become liable for the debt; and

D. The PA's spouse already sold the property in order to liquidate some of the loan.

[21] The Applicants argue that the RAD's suggestion that it would make more sense for the lender to legally enforce the debt was based on speculation, and ignores the evidence in the NDP stating that the judicial process in Nigeria is plagued by strikes, "pervasive" corruption, and difficulties surrounding the enforcement of civil court decisions. By doing so, the Applicants assert that the RAD applied a Western lens in relying on the expectation that reasonable people would seek judicial redress for a breach of contract. The Applicants further submit that even in the Western world, loan sharks use illegal means to enforce repayment. The Applicants submit that the RAD's speculative assumption directly contradicts the PA's testimony and the documentary evidence, and therefore cannot stand.

[22] I am not persuaded by the Applicants' arguments. *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 [*Valtchev*] reminds tribunals to make implausibility findings only in the "clearest of cases": at para 7. With that caution in mind, I find that the RAD's implausibility finding was justified.

[23] To start, the Applicants' comparison of the AIB with loan sharks is without merit. The Applicants own evidence demonstrated that the AIB is an accredited and government-registered business, with which the PA's mother was affiliated. I also do not find that the RAD applied a Western lens by concluding that the AIB, a legitimate business, would attempt to pursue legal means to enforce the loan agreement with the PA and her mother.

[24] Further, I agree with the Respondent that some of the Applicants' explanations before this Court regarding the ownership and value of the collateral, as well as their argument that the RAD ignored the realities of the judicial process in Nigeria, were not before the RAD. I acknowledge that the Applicants' amended BOC narrative and PA's testimony indicate that the collateral put up for the loan belonged to the ex-husband, that garnishment proceedings would fall on his property, that this property no longer exists as he sold it off, and that he no longer resides in Nigeria.

[25] However, these subsequent events do not explain away the RAD's central concern regarding the PA and her mother's decision to not contact the authorities for help while they were still in Nigeria. Nor do these events impugn the RAD's implausibility finding on the allegation that the AIB, an accredited business, resorted to violence against the PA and her

family rather than pursuing a legal remedy when the loan went into default. I also note that the PA did not offer any of the explanations the Applicants now put before this Court as the reasons for their actions, when such questions were put to them by the RPD.

[26] As the RAD noted, and I agree, the "clearest of cases" language from *Valtchev* does not replace the overall burden on a refugee claimant to establish the factual elements of their case on a balance of probabilities. Having reviewed the Decision, I conclude that the RAD reasonably applied that standard of proof in assessing the central element of the Applicants' claim.

[27] Fourth, the Applicants challenge the RAD's assessment of the affidavits, in particular the affidavit sworn by Mr. Ikhide Samuel to corroborate an alleged attack on the PA while she was taking her children to school on January 15, 2019 [Samuel Affidavit]. Mr. Samuel, a fellow parent, stated in his affidavit that he witnessed the thugs attack the PA at the school premises, and that he noticed the PA's minor children missing from school later in the year and learned that the "same people" were "still after her." The RAD took issue with the lack of detail on how Mr. Samuel "learned" that the thugs were still after the PA and assigned the Samuel Affidavit little weight.

[28] The Applicants argue that the RAD applied too high of a standard of proof when assessing the Samuel Affidavit. The Applicants highlight that the Samuel Affidavit corroborates an incident described in the PA's amended BOC narrative with accuracy, and notes that the BOC narrative describes that the thugs specifically stated where they were from and why they were there during the incident. The Applicants submit that since the thugs, based on the narrative,

stated in front of witnesses that they will return to harm the Applicants, then "it is clear how [Mr. Samuel] found out", as he was "literally" present when the threats were made.

[29] The Applicants rely on *Sivaraja v Canada (Citizenship and Immigration)*, 2015 FC 732 to argue that it is a reviewable error to assess evidence for what it does not say, rather than what it does say: at para 58, citing *Mahmud v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 729 (TD) at para 11. The Applicants also rely on *Belek v Canada (Citizenship and Immigration)*, 2016 FC 205 [*Belek*], where the Court stated that "documents that corroborate some aspects of an applicant's story cannot be discounted merely because they do not corroborate other aspects of [their] story": at para 21.

[30] I find the cases cited by the Applicants distinguishable on the facts and I disagree that the RAD discounted the Samuel Affidavit for what it did not say. The RAD did not contest what Mr. Samuel alleges to have seen as a first-hand witness. However, the RAD correctly pointed out that the Samuel Affidavit does not describe hearing anything that would reveal the assailants' affiliation. The RAD concluded accordingly that the affidavit does not support the allegation that the AIB was responsible for the assault. It was on this basis that the RAD found the Samuel affidavit does not diminish the implausibility related to the central allegation of the claims. As such, unlike *Belek*, I do not find that the RAD's assessment of the Samuel Affidavit "had an adverse impact on the decision it reached": at para 22. Rather, the RAD reasonably concluded that this corroboration was insufficient to overcome the implausibility finding.

[31] The fifth and final argument the Applicants make with respect to the reasonableness of the Decision pertains to the RAD's assessment of the reliability of other affidavits submitted by extended family members and friends. Specifically, the Applicants challenge the RAD's decision to place no weight on them because they did not provide a first-hand account of contents therein. The Applicants argue that the RAD's demand for corroboration in the form of objective evidence ignored the fact that hearsay evidence is admissible in the refugee context. The Applicants highlight subsections 170(g) and (h) of *IRPA*, which confirm that the RPD is not bound by any legal or technical rules of evidence.

[32] The Applicants cite *Shahaj v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1044, where the Court found that the panel erred by imposing "on itself or claimants evidentiary fetters from which Parliament has freed them": at para 9. The Applicants also rely on *Briand v Canada (Attorney General)*, 2018 FC 279 at para 75, where the Court reiterated that a sworn statement creates a presumption that the allegations are true unless there is a reason to doubt their truthfulness, citing *MalDonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (FCA) at para 5.

[33] I am not convinced that the RAD committed the errors as suggested by the Applicants.

[34] I note that the RAD did admit the affidavits in question and found that the RPD erred by not assessing the affidavits. The RAD then went on to consider the affidavits, including the Okhe Affidavit, as well as an affidavit by a friend of the PA's spouse. In both cases, the RAD noted that the affiant's knowledge was not first-hand, as they were not present at the time of the alleged

incident described in the affidavit. This Court has found that it is not unreasonable for decision-makers to afford less weight to an affidavit that contains information not based on first-hand knowledge: *Nsofor v Canada (Citizenship and Immigration)*, 2023 FC 274 at para 30; *Abraham v Canada (Citizenship and Immigration)*, 2023 FC 70 at paras 17 and 21-22. The RAD was entitled to weigh the affidavits as it did. The Applicants' arguments amount to asking the Court to reweigh the affidavit evidence, which is not a proper role for the Court.

B. *Did the RAD breach procedural fairness?*

[35] The Applicants take issue with the RAD's independent assessment of the contents of the affidavits, which resulted in it assigning little to no weight to them. The Applicants submit that these were new credibility findings made on appeal, which constituted issues that were not before the RPD.

[36] Relying on *Ojarikre v Canada (Citizenship and Immigration)*, 2015 FC 896 and several other cases from this Court, the Applicants argue that procedural fairness required the RAD to provide them with an opportunity to respond to these new issues raised on appeal: at para 21; see also *Ugbekile v Canada (Citizenship and Immigration)*, 2016 FC 1397 at para 22; *Husian v Canada (Citizenship and Immigration)*, 2015 FC 684 at para 10; *Palliyaralalage v Canada (Citizenship and Immigration)*, 2019 FC 596 at para 9; *Ali v Canada (Citizenship and Immigration)*, 2022 FC 442 at paras 24-29.

[37] Further, the Applicants argue specifically that the RAD should have given them an opportunity to respond via an oral hearing since the Decision centered on the credibility of the

Applicants' claims and evidence. The Applicants point to the enumerated factors under section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 for determining whether a hearing is required under paragraph 113(b) of *IRPA.*

[38] By failing to provide the Applicants with an opportunity to respond to the credibility concerns arising from the RAD's assessment of the affidavits, the Applicants argue that the breach of procedural fairness in this case is sufficient to quash the Decision: *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at 660.

[39] I reject the Applicants' arguments.

[40] As a starting point, I note that the assessment of the factors for determining whether a hearing is required under paragraph 113(b) of *IRPA* is discretionary based on the permissive wording of the provision. As such, the exercise of this discretion is reviewable on a reasonableness standard. The Applicants do not pursue an argument stating that the decision to not hold an oral hearing was unreasonable.

[41] With the exception of one finding concerning the Okhe Affidavit, I disagree that the RAD's assessment of the affidavits amounted to credibility findings. As noted above, the RAD decided to assign these affidavits less weight because of the affiants' lack of first-hand knowledge, or because the affidavit did not corroborate a central allegation. I agree with the Respondent that there is no requirement for the RAD to seek further submission when it assesses and weighs the Applicants' own earlier evidence.

[42] The RAD did make one credibility finding with respect to the Okhe Affidavit. Specifically, the RAD pointed to Mr. Okhe's statement that the PA went to the police and filed a report concerning the threats, which contradicts the PA's own testimony that she did not go to the police. The RAD found that this contradiction "undermines the credibility of the affidavit and the reliability of what the affiant was told occurred." On that basis, the RAD assigned no weight to the Okhe Affidavit.

[43] At the hearing, counsel for the Applicants made a new argument that since the Okhe Affidavit was in fact part of the record of the PA's mother's refugee claim, and was not submitted by the PA, the RAD ought to have invited the Applicants to comment on the Okhe Affidavit before opining on its credibility.

[44] Having reviewed the CTR, I surmise that the Okhe Affidavit was included in the record compiled by the RPD with respect to the Applicants' refugee hearing [RPD Record]. Specifically, the Okhe Affidavit was included as part of the "Disclosure COI – Counsel" dated March 6, 2020 on the Consolidated List of Documents of the RPD Record: CTR at page 307.

[45] While it remains unclear whether or not the Applicants were aware that such disclosure was made prior to their appeal to RAD, I find the RAD's reliance on the Okhe Affidavit did not constitute a breach of procedural fairness.

[46] As the Court stated in *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 at para 30, which was cited in *Ajayi v Canada (Citizenship and Immigration)*, 2022 FC 573 [*Ajayi*] at para 32, a case relied on by the Respondent:

> …there is a fine… line between situations where the RAD raises and deals with a "new question" and those where it simply makes reference to an additional piece of evidence on the record to support an already existing conclusion of the RPD on a factual assessment or on a credibility issue.

[47] Here, the Applicants' credibility regarding her claims surrounding the loan default and circumstances arising from it was an issue squarely raised and addressed by the RPD in its decision. It was also an issue that the Applicants raised in their submissions on appeal to the RAD. While the factual circumstances might not be similar to that in *Ajayi*, the principle noted at para 32 of that case still applies.

[48] Second, like the Respondent, I note that the RAD relied on several reasons to find the Applicants' claim not credible, the key one being the RAD's implausibility finding surrounding the loan agreement, the central element of the Applicants' claim. This distinguishes the case at hand from the other cases cited by the Applicants, where the new credibility findings may have had a more profound impact on the final outcome of the case and as such, ought to have been raised with the applicant in order to provide them with an opportunity to respond.

V. Conclusion

[49] The application for judicial review is dismissed.

[50] There is no question for certification.

JUDGMENT in IMM-3829-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. The Certified Tribunal Record filed prior to this judgment is designated as confidential.
3. The Refugee Appeal Division is ordered to provide an amended Certified Tribunal Record, with pages 377 to 379 and pages 382 to 422 of the current Certified Tribunal Record redacted, within one month of this judgement.
4. There is no question for certification.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	MAGDALENE IMUESEMEN NWANKWO, MASON CHUKWU IFEANYI, MADDISON ONYINYECHI IFEANYI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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