Federal Court  Cour fédérale

Date: 20230707

Docket: IMM-6014-21

Citation: 2023 FC 933

Ottawa, Ontario, July 7, 2023

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

ABIODUN EMMANUEL FATOMILUYI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the decision of the Refugee Appeal Division of the Immigration and Refugee Board of Canada (the "RAD"), dated August 12, 2021 (the "Decision"), which dismissed the Applicant's refugee claim based on the availability of an internal flight alternative ("IFA").

[2] The RAD found that the Applicant was neither a Convention refugee nor a person in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

II. Background

[3] The Applicant, Abiodun Emmanuel Fatomiluyi, is a 48-year-old citizen of Nigeria.

[4] The Applicant retired from Nigerian public service in 2017 after working for over 20 years. After his retirement, the Applicant started a rice farm.

[5] In May 2017, nomadic Fulani herdsmen began to bring cattle to graze on his land, ruining the Applicant's rice crops. The Applicant states that his reports to the police were futile as they were unable to locate the herdsmen and so he abandoned his farm site and began farming at a different location. However, within two months, the herdsmen again brought cattle to graze on his land. In response, the Applicant purchased a chemical spray that he thought would deter cattle, but inadvertently the spray killed some of the cattle that grazed on his land instead.

[6] The Applicant claims that soon after this, on November 25, 2017, a group of Fulani herdsmen attacked the farm with guns and machetes. While the Applicant escaped, he states that two of his workers were injured in the attack and that one died of a gunshot wound. The Applicant abandoned the farm. However, he claims that when he and his family attended a vigil, the Fulani herdsmen broke into his home. The herdsmen purportedly ransacked the house, stole items and scrawled threats on the wall.

[7] The Applicant also claims that on December 22, 2017, the herdsmen broke into the church where the Applicant is a pastor and threatened him. The Applicant subsequently fled to Lagos and three days later, claims to have been threatened again by the herdsmen.

[8] On December 13, 2017, the Applicant obtained a visa for the United States of America. The Applicant left Nigeria for the United States on February 2, 2018. On April 15, 2018, he crossed the border into Canada and, on May 9, 2018, made a claim for refugee protection.

[9] Since that time, neither the Applicant nor his family have had any contact with the herdsmen.

[10] On October 2, 2020, the Refugee Protection Division (the "RPD") rejected the claim and concluded that the Applicant had an IFA in the city of Port Harcourt. The Applicant appealed this judgment to the RAD.

III. Decision under Review

[11] In a decision dated August 12, 2021, the RAD dismissed the appeal and upheld the RPD's finding of an IFA in Port Harcourt.

[12] The RAD found that the RPD correctly identified and applied the two-part test to determine a viable IFA: (1) is there serious possibility of persecution or risk to life or cruel and unusual treatment, punishment or torture in the proposed destination and (2) is it reasonable for the Applicant to relocate to the proposed destination.

[13] However, prior to the RAD making its assessment with respect to the IFA, the Applicant asked the RAD to admit new evidence on appeal pursuant to subsection 110(4) of the *IRPA*. The new evidence was an online news article that reported on the kidnapping and murder of a prominent lawyer by suspected Fulani herdsmen near Port Harcourt. The RAD rejected the evidence because the article did not meet the newness statutory criteria under subsection 110(4) of the *IRPA*. The article predated the Applicant's RPD hearing and the Applicant's submission that he could not have reasonably been expected to provide the article because he "did [not] know of the existence of this publication" was not enough to establish that it was not reasonably available to him prior to the RPD decision.

[14] The RAD then assessed the two-part IFA test. With respect to the first prong, the RAD made the following determinations:

A. The Applicant failed to establish that there was a serious possibility of persecution by the Fulani herdsmen. There was insufficient evidence of the Fulani herdsmen's means of persecution. While the Applicant contended that the herdsmen could trace the Applicant because they did so while the Applicant was in Lagos, there was no evidence they could actually locate or harm him anywhere in the country. Nationwide information sharing between the Fulani herdsmen is rare.

B. There is little evidence that the Fulani herdsmen carry out attacks everywhere in Nigeria, including near Port Harcourt. Evidence from the National Documentation Package ("NDP") showed that the herdsmen attacks generally occurred in the northern and middle portions of Nigeria. The Applicant's subjective belief that the

herdsmen carried out attacks throughout Nigeria was insufficient to establish that they in fact did so.

C. The Applicant failed to establish that the Fulani herdsmen are motivated to trace him to Port Harcourt. The Applicant testified vaguely that the herdsmen had his picture and could, through their associations and networks, be able and willing to track him to Port Harcourt. There was also limited evidence to establish that the Fulani herdsmen were pursuing him specifically because of his religion or status as pastor. The last contact between the Applicant and the herdsmen was a supposed December 2017 phone call. Apart from the Applicant's beliefs, there is no objective evidence that the Fulani remain motivated to pursue him.

[15] With respect to the second prong of the IFA test, the RAD made the following findings:

A. There would be some hardship for the Applicant to relocate to Port Harcourt but it would not be unreasonable for him to do so as there would be no jeopardy to the his life and safety.

B. The Applicant failed to establish that he would face difficulties in finding work that would jeopardize his life or safety. The Applicant is well educated, possessing an MBA degree as well as a diploma in accounting. He worked as an accountant in the Nigerian government for 20 years. While the dominant industry in Port Harcourt is the oil sector, there are also management and accounting positions within that industry where the Applicant might find work.

C. The Applicant did not challenge the reasonableness of Port Harcourt as an IFA in light of the Applicant's religion, language skills or ethnicity.

D. While healthcare conditions in Nigeria with respect to mental health are not ideal, the Applicant failed to establish that there is a reasonable possibility of persecution as a result. The Applicant's psychotherapy report indicated that the Applicant was having symptoms of depression and anxiety and states that these emanated from uncertainty as to whether he would be permitted to remain in Canada, rather than from his past traumatic experience in Nigeria. The report also states that these symptoms may worsen if the Applicant is to return to Nigeria. While the Applicant provided general and vague evidence that people in Nigeria with mental health issues are treated poorly, the Applicant failed to provide evidence in relation to his particular circumstances and condition.

[16] Having found the two-part IFA test met for Port Harcourt, the RAD dismissed the appeal and found the Applicant neither a Convention refugee, nor a person in need of protection under sections 96 and 97 of the *IRPA*.

IV. Issues

A. Did the RAD err in failing to accept the Applicant's evidence under subsection 110(4) of the IRPA?

B. Did the RAD err in finding that Port Harcourt was a viable IFA for purposes of the IRPA?

V. Standard of Review

[17] The standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 25 [*Vavilov*]).

VI. Analysis

A. *Did the RAD err in failing to accept the Applicant's evidence under subsection 110(4) of the IRPA?*

[18] The explicit statutory criteria of subsection 110(4) of the *IRPA* provide that new evidence submitted to the RAD but not the RPD must meet "newness" criteria. That is, in order to be admitted, fresh evidence must have arose after the rejection of the claim, not have been reasonably available at the time of the rejection of the claim or the circumstances must be such that the person could not have been reasonably expected to present the evidence at the time of the RPD's determination.

[19] Here, the RAD made no error in rejecting the Applicant's evidence consisting of an online news article. The article predated the RPD hearing significantly and, as the RAD noted, was publicly available on a newspaper's website. Further, the RAD made no error in concluding that the Applicant's explanation that the evidence was not reasonably available because he

subjectively did not know it is existed was without merit. The Article was available freely and publicly and the Applicant could have been reasonably expected to present it in light of his claim.

B. *Did the RAD err in finding that Port Harcourt was a viable IFA for purposes of the IRPA?*

[20] The RAD cited the correct test for an IFA for a refugee claim. Once an IFA site is identified, the two-part test asks:

A. Is there risk to life, or a risk of cruel and unusual treatment or punishment?

B. Is the IFA site reasonable for the Applicant to relocate to and reside in?

(*Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 at 711 (CA))

[21] The onus is on the Applicant to establish on a balance of probabilities that the IFA fails because it fails to meet one of the two conjunctive prongs of the above test (*Iyere v Canada (Citizenship and Immigration)*, 2018 FC 67 at para 32).

[22] The Applicant makes the following arguments as to how the RAD, in coming to the conclusion that Port Harcourt was a viable IFA, unreasonably assessed the evidence before it:

A. The RAD did not adequately consider the Applicant's testimony that the Fulani herdsmen have the network and capacity to trace him in Port Harcourt.

B. The RAD erred in finding the Fulani herdsmen's sphere of influence does not extend to Port Harcourt.

C. The RAD erred in finding that the Fulani herdsmen were not highly motivated to find the Applicant. The Applicant's Christian faith played a role in this. Evidence from the NDP indicates that the Fulani have on occasion attacked churches.

D. The RAD erred in finding that the Applicant would likely be able to find work in Port Harcourt, as most of the employment opportunities are in the oil sector.

E. The RAD engaged in an unduly "microscopic" analysis of the Applicant's psychotherapy report.

[23] The Applicant largely asks the Court to reweigh evidence that the RAD has already considered and come to an alternative conclusion. There can be little suggestion that the RAD wholly ignored significant testimony or other evidence. It is not the role of this Court on judicial review to substitute its assessment of the evidence in place of the RAD's (*Vavilov* at para 125).

[24] With respect to the ability of the Fulani herdsmen to track the Applicant and their sphere of influence, the RAD noted that the evidence from the NDP indicated that the Fulani herdsmen's activities concentrated in the middle and northern rural areas of Nigeria. The

Applicant's reliance on the article, rejected by the RAD, as evidence of the Fulani herdsmen operating in or around Port Harcourt is irrelevant; as reviewed above, the RAD did not err in rejecting the article as fresh evidence under subsection 110(4) of the *IRPA*.

[25] With respect to the Fulani herdsmen's motivation, there was no evidence or indication of any threats or interaction between the Applicant or his family and the Fulani herdsmen since December 2017.

[26] With respect to the Applicant's employment prospects in Port Harcourt, the RAD made no error in determining that the Applicant's education and lengthy work experience would aid him in finding employment in Port Harcourt.

[27] The RAD also made no error in its assessment of the Applicant's psychotherapy report and the Applicant's potential mental health challenges. The RAD noted general challenges in Nigeria in obtaining adequate mental healthcare; however, it also observed that the Applicant had failed to present evidence of how his specific condition would suffer due to inadequate care.

[28] All of these findings were reasonable.

VII. Conclusion

[29] The application is dismissed.

JUDGMENT in IMM-6014-21

THIS COURT'S JUDGMENT is that:

1. This application is dismissed.

2. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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