Federal Court  Cour fédérale

Date: 20230906

Docket: IMM-9777-22

Citation: 2023 FC 1200

Ottawa, Ontario, September 6, 2023

PRESENT: The Honourable Mr. Justice Régimbald

BETWEEN:

VICTOR KUSANGBA WALE ARIYO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Victor Kusangba Wake Ariyo is a citizen of Nigeria who alleges fearing being killed by members of a secret cult, also known as the "Bad Guys". In 2018, this cult started to disrupt the order within the Applicant's community by harassing its residents, committing rapes, shootings and robbery. The Applicant alleges that because he was the head of a vigilante group protecting the community and tried to stop their attacks, the Bad Guys have targeted him.

[2] The Applicant hid in Lagos for about one year before leaving Nigeria. He came to Canada in November 2019 and made a refugee claim in August 2020.

[3] The Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] heard the Applicant's claim on December 1, 2021, and rejected his claim on May 3, 2022.

[4] The Refugee Appeal Division [RAD] of the IRB dismissed the Applicant's appeal [Decision] and confirmed the decision of the RPD. The determinative issue before both tribunals was the availability of an internal flight alternative [IFA] for the Applicant in Lagos, Nigeria. The RPD also made credibility findings in the context of the IFA analysis.

[5] The Applicant now seeks judicial review of the Decision.

[6] For the reasons below, I allow this judicial review.

II. Issues and Standard of Review

[7] The parties have raised a number of issues but the Court needs to examine only one to dispose of the present application.

A. *Did the RAD reasonably decline to accept the new evidence?*

[8] The parties agree that the standard of review in this case is that of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 25). To avoid judicial intervention, the decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility (para 99). A decision may be unreasonable if the decision maker misapprehended the evidence before it (paras 125-126). The party challenging the decision bears the onus of demonstrating that the decision is unreasonable (para 100).

III. Relevant Legislation

***Immigration and Refugee Protection Act* (S.C. 2001, c. 27)**	***Loi sur l'immigration et la protection des réfugiés* (L.C. 2001, ch. 27)**
Appeal to Refugee Appeal Division	**Appel devant la Section d'appel des réfugiés**
Appeal	**Appel**
110 (1) Subject to subsections (1.1) and (2), a person or the Minister may appeal, in accordance with the rules of the Board, on a question of law, of fact or of mixed law and fact, to the Refugee Appeal Division against a decision of the Refugee Protection Division to allow or reject the person's claim for refugee protection.	**110 (1)** Sous réserve des paragraphes (1.1) et (2), la personne en cause et le ministre peuvent, conformément aux règles de la Commission, porter en appel — relativement à une question de droit, de fait ou mixte — auprès de la Section d'appel des réfugiés la décision de la Section de la protection des réfugiés accordant ou rejetant la demande d'asile.
Procedure	**Fonctionnement**
(3) Subject to subsections (3.1), (4) and (6), the Refugee	**(3)** Sous réserve des paragraphes (3.1), (4) et (6), la

Appeal Division must proceed without a hearing, on the basis of the record of the proceedings of the Refugee Protection Division, and may accept documentary evidence and written submissions from the Minister and the person who is the subject of the appeal and, in the case of a matter that is conducted before a panel of three members, written submissions from a representative or agent of the United Nations High Commissioner for Refugees and any other person described in the rules of the Board.

section procède sans tenir d'audience en se fondant sur le dossier de la Section de la protection des réfugiés, mais peut recevoir des éléments de preuve documentaire et des observations écrites du ministre et de la personne en cause ainsi que, s'agissant d'une affaire tenue devant un tribunal constitué de trois commissaires, des observations écrites du représentant ou mandataire du Haut-Commissariat des Nations Unies pour les réfugiés et de toute autre personne visée par les règles de la Commission.

Evidence that may be presented

(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

Éléments de preuve admissibles

(4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

Refugee Appeal Division Rules (SOR/2012-257)

Règles de la Section d'appel des réfugiés (DORS/2012-257)

Documents or Written Submissions not Previously Provided

Documents or written submissions not previously provided — person

Documents ou observations écrites non transmis au préalable.

Documents ou observations écrites non transmis au

	préalable — personne en cause
29 (1) A person who is the subject of an appeal who does not provide a document or written submissions with the appellant's record, respondent's record or reply record must not use the document or provide the written submissions in the appeal unless allowed to do so by the Division.	**29 (1)** La personne en cause qui ne transmet pas un document ou des observations écrites avec le dossier de l'appelant, le dossier de l'intimé ou le dossier de réplique ne peut utiliser ce document ou transmettre ces observations écrites dans l'appel à moins d'une autorisation de la Section.
Factors	**Éléments à considérer**
(4) In deciding whether to allow an application, the Division must consider any relevant factors, including:	**(4)** Pour décider si elle accueille ou non la demande, la Section prend en considération tout élément pertinent, notamment :
(a) the document's relevance and probative value;	**a)** la pertinence et la valeur probante du document;
(b) any new evidence the document brings to the appeal; and	**b)** toute nouvelle preuve que le document apporte à l'appel;
(c) whether the person who is the subject of the appeal, with reasonable effort, could have provided the document or written submissions with the appellant's record, respondent's record or reply record.	**c)** la possibilité qu'aurait eue la personne en cause, en faisant des efforts raisonnables, de transmettre le document ou les observations écrites avec le dossier de l'appelant, le dossier de l'intimé ou le dossier de réplique.

IV. Analysis

A. *The RAD's reasons justifying its finding that the new evidence does not meet statutory admissibility requirements is unreasonable.*

[9] The Applicant submits that the RAD misapplied the law regarding the admission of new evidence and that the new evidence he filed did meet the statutory conditions of subsection 110(4) of the *Immigration and Refugee Protection Act* (S.C. 2001, c. 27) [IRPA].

[10] Before the RAD, the Applicant submitted as new evidence:

- Exhibit A, three photographs showing documents entitled "Extract from Crime Diary" dated April 9, 2022, January 4, 2021, and November 17, 2020. These three Crime Diaries were related to the Applicant's daughter having been assaulted in Lagos on those dates, and having complained to the police;
- Exhibit B, a photograph of an affidavit sworn by the Applicant's daughter, Ariyo Merci Modupeoluwa on April 11, 2022;
- Exhibit C, a photograph of an affidavit sworn by the Applicant's daughter Ariyo Merci Modupeoluwa on January 5, 2021.

[11] The Applicant further argues that these documents are highly probative because they corroborate his claim of being persecuted by the Bad Guys, including in Lagos (the proposed IFA), and because they originate from trustworthy sources (his daughter and official Nigerian police documents). In the documents, it is stated that his daughter was assaulted in Lagos and that the perpetrators asked her the whereabouts of the Applicant and mentioned that he would be killed if he returned to Nigeria. As a result, the documents should have been accepted based on

their relevance. However, the RAD failed to properly consider the Applicant's justification for the delay and the relevance of the new evidence.

[12] The Applicant also argues that he had the right to provide new evidence that contradicted the RPD's finding as this new evidence concerned the motivation and means of the agents of persecution in locating him, and therefore, contradicted the credibility findings (*Ismailov v. Canada (Citizenship and Immigration)*, 2015 FC 967, at para 53).

[13] Pursuant to subsection 110(4) of the IRPA, the Applicant could present to the RAD new evidence that (1) arose after the rejection of his claim (2) or that was not reasonably available, (3) or that he could not reasonably have been expected in the circumstances to have presented at the time of the rejection.

[14] In *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh* 2016], the Federal Court of Appeal found that in addition to considering the evidence's timeliness under subsection 110(4) of IRPA, the RAD must also consider the relevant factors set out in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 [*Raza*], which include the newness, relevance and credibility of the evidence (also in *Faysal v Canada (Citizenship and Immigration)*, 2021 FC 324 at para 18).

[15] As held by Justice Manson in *Marku v Canada (Citizenship and Immigration)* 2022 FC 255 at paragraph 25, the "onus is on the Applicants to prove the relevance, materiality, newness, and credibility of the proposed new evidence in a memorandum."

[16] In this case, the RAD acknowledged that if the evidence met at least one of the statutory requirements of subsection 110(4), it needed to decide whether the evidence was new, credible and relevant as required in accordance with *Singh* 2016 (para 38). However, it found that the Applicant had not met his burden to establish that the exhibits to his affidavit met the statutory admissibility requirements and stopped its analysis there.

[17] More specifically, the RAD found that the new evidence was inadmissible because it did not arise after the RPD decision, and because the Applicant had not established that this evidence was not available to him or that he could not reasonably have been expected to present it before the RPD decision.

[18] Before the RAD, the Applicant explained that he had lost contact with his daughter after November 17, 2020, when his daughter was assaulted and her phone was stolen. He explained that he was only able to reconnect with her a few days after his sister met with his daughter in Lagos on March 21, 2022, and was able to get her phone number. The Applicant explained that his daughter could not inform him of the attack because he had also changed his Canadian phone number and had not been able to inform his daughter of his new number.

[19] The RAD found, at paragraph 10, that the Applicant had not given a date nor explained how or when he received the documents that he asked the RAD to accept as new evidence.

[20] The RAD also noted that with the exception of one crime diary extract (the one dated on April 9, 2022) and one of the affidavits sworn by his daughter (the one dated April 11, 2022), the

documents appear to have been created before the Applicant's sister met with his daughter, over a month before the RPD decided his claim. The RAD did not draw any clear conclusion on this fact, and there are no reasons offered by the RAD as to how the dates of the documents impact its decision.

[21] The RAD also noted that the Applicant was represented by counsel and provided other post-hearing evidence. The RAD did not explain in its reasons what impact this fact may have had on its conclusion that the new evidence did not meet the statutory test under subsection 110(4) of the IRPA.

[22] In my view, the RAD's reasons are not sufficiently justifiable, transparent or intelligible and the Decision is therefore unreasonable (*Vavilov* at para 81).

[23] First, the fact that the Applicant did not provide a specific date on which he received the new documents from his daughter is not relevant. In his affidavit in support of the new evidence, which was sworn on June 14, 2022, the Applicant explains how he was able to reconnect with his daughter a few days after his own sister met with her on March 21, 2022, in Lagos [CTR at 61 PDF]. The Applicant's daughter then swore an affidavit dated April 11, 2022.

[24] The RAD either failed to consider, or rejected that evidence, and instead opined that the Applicant did not "give a date nor does he explain how or when he received the documents". The RAD does not explain its conclusion in that regard and why the Applicant's evidence squarely responding to the issue is not sufficient.

[25] The RAD then held, without explanation, that the Applicant did not meet the statutory requirements. However, the RAD does not explain why, or on what ground. While the RAD could potentially reject the Applicant's evidence and draw a finding on credibility, it did not do so. If the RAD's decision is to the effect that the evidence was reasonably available or that the Applicant could reasonably have been expected to present his evidence before the decision of the RPD on May 3, 2022 (and therefore failed to meet the criteria established under section 110(4)), it was incumbent on the RAD to state so specifically.

[26] While the RAD's reasons are not clear, it appears that the RAD relies on the fact that the Applicant was represented by counsel and had provided other post-hearing evidence. An inference from the reasons suggests that the Applicant had about three weeks between the swearing of his daughter's affidavit on April 11, 2022, and the RPD decision issued on May 3, 2022, to file his new evidence to the RPD. However, the RAD's reasons do not explain whether the Applicant's new evidence is rejected on that basis.

[27] It is important to note at this point that the Applicant's RPD hearing was held on December 10, 2021. The RPD decision was issued on May 3, 2022.

[28] The new evidence that the Applicant attempts to present includes the three crime diaries reported by his daughter on November 17, 2020, January 4, 2021, and April 9, 2022, as well as her two affidavits dated January 5, 2021, and April 11, 2022. All of that evidence became available to the Applicant solely when he was able to reunite with his daughter at the end of March 2022.

[29] The Applicant received the RPD decision on May 3, 2022, which is about one month after reuniting with his daughter, learning that she had been assaulted three times in Lagos, and that her assailants mentioned that the Applicant would be killed if he ever returned to Nigeria. He then swore an affidavit to file this new evidence with his appeal on June 14, 2022, about a month after he received the negative decision from the RPD.

[30] The Applicant was indeed represented by counsel and did provide other post-hearing evidence to the RPD. However, that "other post-hearing evidence" consists of counsel's written submissions filed on December 10, 2021 (10 days after the hearing that was held on December 1, 2021) and a progress report of psychotherapy treatment that was filed on December 29, 2021 (29 days after the hearing was held).

[31] The issue of mental health and the availability of the resources for the Applicant in the possible IFAs had been discussed during the hearing before the RPD and counsel for the Applicant had argued that the Applicant would not be able to obtain adequate mental health care in the proposed IFAs. Submitting further evidence on his personal mental health situation (an updated psychotherapy report on an issue squarely before the RPD) was therefore expected by the decision maker.

[32] The RAD's statement that the Applicant "was represented by counsel" and "provided other post-hearing evidence", without identifying why these conclusions are relevant to the ultimate finding that the Applicant failed to "meet statutorily admissibility requirements" therefore lacks the justification, transparency and intelligibility expected in a reasonable decision

(*Vavilov* at para 81). Indeed, the RAD does not provide any explanation as to why the fact that the Applicant provided post-hearing evidence within one month of the hearing, on an issue discussed during the hearing, means that the Applicant was required to file new evidence on a completely new issue that the RPD was not familiar, months later. The RAD also does not explain why having filed post-hearing evidence somehow prejudices the Applicant from being able to file new evidence before the RAD on a completely separate issue (*Warsame v Canada (Citizenship and Immigration),* 2019 FC 920 [*Warsame*] at paras 34-35).

[33] In my view, the RAD failed to afford sufficient flexibility on the explanation provided by the Applicant. More importantly, the RAD failed to properly justify why it rejected the Applicant's evidence on the circumstances leading him to discover the new evidence (and instead simply stating that "[t]he Appellant does not give a date nor does he explain how or when he received the documents") and why he failed to "meet statutory requirements."

[34] The RAD's refusal to admit the Applicant's new evidence is a reviewable error and is itself sufficient to return this matter to another panel for redetermination (*Warsame* at para 42).

V. Conclusion

[35] The RAD's decision is unreasonable as the reasons it provided to reject the new evidence is not justiciable, transparent or intelligible.

[36] The file will be remitted to the RAD for reconsideration, taking into account the Court's decision.

[37] The parties have not identified a question to be certified and I agree that none arise.

JUDGMENT in IMM-9777-22

THIS COURT'S JUDGMENT is that:

1. The judicial review is allowed.

2. The decision is remitted to another decision maker.

3. No question for certification arise.

"Guy Régimbald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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