Federal Court  Cour fédérale

Date: 20200304

Docket: IMM-5916-18

Citation: 2020 FC 334

Ottawa, Ontario, March 4, 2020

PRESENT: The Honourable Mr. Justice McHaffie

BETWEEN:

CORDILIA IDUGBOE
JASMINE OSATOHENMWEN IDUGBOE
IKPONMWOSA JADEN IDUGBOE
OSAIGBOVO JOEL IDUGBOE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mrs. Cordilia Idugboe and her three minor children fled her ex-husband's family in Nigeria, and ultimately sought refugee protection in Canada. The Idugboes' claim was rejected by the Refugee Protection Division (RPD) and their appeal was dismissed by the Refugee

Appeal Division (RAD). Both the RPD and the RAD concluded that there was no serious possibility of risk of any threat from the ex-husband's family in Port Harcourt, Nigeria, and that it would be reasonable for the Idugboes to relocate there. Port Harcourt was therefore a viable internal flight alternative (IFA) within Nigeria and the claim for refugee protection was thus not made out.

[2] In dismissing the family's appeal, the RAD refused to admit ten new pieces of evidence, which addressed alleged threats from the ex-husband's family after the RPD decision, and additional information regarding the reasonableness of Port Harcourt as an IFA. Some of this evidence was rejected as not being credible, while some was found to be evidence that could and should have been filed with the RPD. The Idugboes assert that the rejection of this evidence was unreasonable, and that it was unfair for the RAD to reject the evidence on credibility grounds without holding an oral hearing. They also assert that the IFA finding was itself unreasonable.

[3] I find that the RAD did not act unreasonably or unfairly in rejecting the new evidence. The credibility findings of the RAD were reasonably open to it on the record, and the RAD was not required in these circumstances to hold an oral hearing before reaching this determination. The RAD's conclusions that some of the evidence was reasonably available at the time of the RPD hearing were similarly supported and reasonable. Having made these determinations on the new evidence, the RAD's conclusion that the Idugboes have an IFA in Port Harcourt and that they are thus not Convention refugees or persons in need of protection was also reasonable. This application for judicial review is therefore dismissed.

II. The Idugboes' Claim for Refugee Protection

[4] Mrs. Idugboe and her two sons are citizens of Nigeria. The remaining applicant, Mrs. Idugboe's daughter, is an American citizen, having been born there after the family left Nigeria in 2014.

[5] The Idugboes allege that they fear persecution by the family of Mrs. Idugboe's former husband, the father of the children. Mrs. Idugboe alleges that Mr. Idugboe's family threatened and plotted to force her to undergo female genital mutilation (FGM) while she was pregnant, and to do the same with her daughter once she was born. While Mr. Idugboe himself did not support this, he was unable to stop his family.

[6] Given Mr. Idugboe's inability to protect Mrs. Idugboe, she filed for divorce and their marriage was dissolved in December 2013. This removed the threat of FGM against Mrs. Idugboe herself. However, Mrs. Idugboe continued to receive threats that her daughter would have to undergo FGM when she was born, and that Mrs. Idugboe would be harmed or killed if she did not comply. Mrs. Idugboe fled Nigeria to the United States with her sons in early 2014 and her daughter was born in the US that year.

[7] Mrs. Idugboe claims that she was not aware that she could claim refugee protection in the US until it was too late. The family later crossed the Canadian border in 2017 and claimed refugee protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The Idugboes fear that if they return to Nigeria, the daughter will be

forced to undergo FGM and that Mrs. Idugboe will suffer retaliation for having refused her ex-husband's family's demands in this regard.

[8] During their refugee hearing, the RPD raised the potential for the family to relocate to Port Harcourt, Nigeria. Mrs. Idugboe denied that this would be a safe alternative, as Mr. Idugboe had relatives throughout Nigeria, including in Port Harcourt. She also noted that one of her sons suffers from sickle cell anemia, a condition that worsens with mosquito bites, and that he would suffer due to conditions in Nigeria, including in Port Harcourt.

[9] The RPD rejected the Idugboes' refugee claims. A determinative issue for the RPD was the availability of an IFA in Port Harcourt. The RPD found that Port Harcourt met the two established requirements for an IFA, namely that there was no serious possibility of persecution or harm in Port Harcourt, and that it would not be unreasonable for them to relocate there: *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (CA) at pp 709–711.

[10] With respect to the first requirement or prong of the IFA analysis, the RPD found that the ex-husband's family would not have the means, capacity or motivation to locate them there. The RPD rejected as speculative Mrs. Idugboe's evidence that Mr. Idugboe had relatives throughout Nigeria and that his immediate family could and would locate her in the large city of Port Harcourt. The RPD also found there was insufficient evidence that the family was motivated to find her, since there was no evidence of any threats or inquiries about her whereabouts since 2013, even though Mrs. Idugboe had been in contact with her ex-husband and his sister.

[11] With respect to the second requirement, the RPD found that it would be objectively reasonable for the Idugboes to relocate to Port Harcourt. The RPD found that the evidence did not show that the risk associated with the son's health condition reached the level of jeopardizing his life and safety, and thus did not reach the high threshold for unreasonableness in the IFA analysis: *Ranganathan v Canada (Minister of Citizenship & Immigration)*, [2001] 2 FC 164 (CA) at para 15. The RPD was also satisfied that it was possible for Mrs. Idugboe to be head of a household and survive financially in Port Harcourt, as she was highly educated and could obtain employment without family connections.

III. The Idugboes' Appeal to the RAD

[12] The Idugboes appealed the RPD's IFA determination to the RAD. Appeals to the RAD generally proceed (a) without an oral hearing, and (b) on the basis of the record that was before the RPD. New documentary evidence may only be presented on appeal if it arose subsequently, was not previously available, or could not reasonably have been expected to be presented to the RPD. The RAD may hold a hearing if the new evidence raises a serious issue of credibility, is central to the decision, and would justify allowing or rejecting the claim. These principles are set out in subsections 110(3), (4) and (6) of the *IRPA*:

Procedure

(3) Subject to subsections (3.1), (4) and (6), the Refugee 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…

Fonctionnement

(3) Sous réserve des paragraphes (3.1), (4) et (6), la 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…

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.

Hearing

(6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)

(a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;

Audience

(6) La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois :

a) soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;

(b) that is central to the decision with respect to the refugee protection claim; and	**b)** sont essentiels pour la prise de la décision relative à la demande d'asile;
(c) that, if accepted, would justify allowing or rejecting the refugee protection claim.	**c)** à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas.
[Emphasis added.]	[Je souligne.]

[13] It is common ground that for new evidence to be admitted before the RAD, it must meet both the express statutory requirements of subsection 110(4), and the "*Raza* factors" of credibility, relevance, and materiality: *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at paras 13–15; *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at paras 38–49.

[14] On their appeal to the RAD, the Idugboes filed a new evidence brief containing eight new pieces of evidence that they sought to rely on pursuant to subsection 110(4): four affidavits that spoke to events occurring in early 2018 in which members of Mr. Idugboe's family asked about and/or issued threats to Mrs. Idugboe; two letters pertaining to the son's medical issues; and two pieces of evidence (an affidavit and a printout from Facebook) relating to the presence of members of Mr. Idugboe's family in Port Harcourt. In addition, after perfection of the appeal, the Idugboes sought to file two further pieces of evidence relating to statements and an attack by Mr. Idugboe's family occurring in September 2018.

[15] The RAD rejected each of the ten pieces of evidence. The four affidavits regarding events in early 2018 were rejected on grounds of credibility, as were the two emails filed after perfection of the appeal. The two letters concerning medical issues and the two pieces of evidence regarding family members in Port Harcourt were rejected as being evidence previously available to the Idugboes and therefore not meeting the requirements of subsection 110(4).

[16] Having rejected the new evidence, the RAD reviewed and upheld the RPD's decision regarding the IFA, applying a correctness standard. The RAD concluded based on its review of the evidence that the Idugboes had failed to demonstrate that the agents of persecution had the means, ability and motivation to locate them in Port Harcourt, and that it was not unreasonable for them to relocate to Port Harcourt in all of the circumstances, including the son's health issues. The RAD therefore dismissed the appeal.

IV. Issues

[17] The Idugboes raise the following issues:

A. Did the RAD improperly reject the new evidence on credibility grounds, particularly without calling an oral hearing?

B. Was the RAD's rejection of the new medical evidence unreasonable?

C. Was the RAD's conclusion that Port Harcourt was a viable IFA unreasonable?

V. Analysis

A. *The RAD's Rejection of Some of the New Evidence on Credibility Grounds*

(1) The RAD's credibility findings are reasonable

[18] The parties agree that the RAD's assessment of the admissibility of the new evidence, and its associated determinations of credibility, are reviewable on a reasonableness standard. While this matter was argued prior to the Supreme Court of Canada's decision in *Vavilov*, that case confirms that the reasonableness standard applies to the merits of the RAD's decision on these issues: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25.

[19] The RAD accepted that the four affidavits regarding events occurring in early 2018 met the legislative requirements of subsection 110(4), since they referred to events that post-dated the RPD's decision of January 12, 2018. However, in analyzing the *Raza* factors, the RAD concluded that the affidavits lacked credibility and refused to admit them.

[20] The RAD made its credibility finding in the context of Mrs. Idugboe's evidence before the RPD in December 2017. Mrs. Idugboe stated that she had not been in contact with her own family as they had sided with Mr. Idugboe's family. She also said that the last time Mr. Idugboe's family had approached anyone she knew to threaten her about performing FGM on her daughter was before she left Nigeria in January 2014. The RPD referred to the lack of

threats between January 2014 and December 2017 in concluding there was insufficient evidence that Mr. Idugboe's family was still motivated to locate them.

[21] The four affidavits put forward on appeal as new evidence were from:

- one of Mrs. Idugboe's sisters, saying that she "ran into" an unidentified relative of Mr. Idugboe in January 2018, who issued threats against Mrs. Idugboe and her daughter;
- another of Mrs. Idugboe's sisters, saying that she had been receiving a series of calls and unauthorized visits on unspecified dates from unidentified members of Mr. Idugboe's family threatening violence;
- Mrs. Idugboe's brother, saying that at a wedding in Benin in February 2018, he met Mr. Idugboe's brother, who made threats against Mrs. Idugboe and her daughter; and
- a neighbour of Mrs. Idugboe, saying that he "ran into" a relative of Mr. Idugboe in January 2018, who asked after Mrs. Idugboe and said he would compensate the neighbour for information about her whereabouts.

[22] In this context, the RAD found it "too fortuitous to be true" that within two weeks of receipt of the RPD's decision, "a cluster of events happened and corroboration for those events were made at the end of March 2018 by a number of individuals."

[23] I agree with the Idugboes that the dates on which the affidavits were sworn is not a sound basis to assess their credibility. Indeed, given that the affidavits were sworn for the purposes of the appeal, one would expect them to have been obtained between receiving the decision and the

filing of the appeal. However, while the RAD did adversely comment on the timing of the affidavits, the primary basis on which the evidence was rejected was the timing of the alleged events themselves:

> In this case I find that the circumstances of these four pieces of new evidence belie credulity. The timing of the alleged events, the likelihood that 3 of the principal Appellant's siblings and a former neighbour, who all live in different places, would each have their own specific encounter that directly affects the principal Appellant's claim is highly suspicious and improbable in my view. I find the circumstances are not credible and therefore these four pieces of new evidence are inadmissible as they are lacking in credibility.
>
> [Emphasis added.]

[24] This amounts to a finding that it is implausible that the multiple events could have arisen within a short period after the RPD decision, when years had passed without any evidence of such threats arising. The Idugboes argue the finding is inconsistent with the *Valtchev* principle that implausibility findings should only be made in the clearest of cases, since notions of implausibility are inherently subjective and may be culturally influenced: *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at paras 7–8.

[25] I find the RAD's credibility finding with respect to this evidence to be reasonable and not to offend the principle in *Valtchev*. I note that the RAD's finding does not pertain to the implausibility of a particular narrative, story or series of events, and is not based on perceptions of what constitutes "rational behaviour," as was the focus in *Valtchev*. Rather, it is based on the suspicious timing of a rash of threats allegedly arising immediately after the RPD had relied on the absence of threats from the family for a period of four years. *Valtchev* does not prevent the RAD from noting and relying on such concerns. As the Federal Court of Appeal stated in *Raza*,

the credibility of evidence can reasonably be assessed in "considering its source and the circumstances in which it came into existence": *Raza* at para 13; *Singh* at para 38. In any event, *Valtchev* notes that the "clearest of cases" standard reflects facts that are "outside the realm of what could reasonably be expected." This description fairly applies to the sudden appearance of multiple allegations of threats after four years of silence.

[26] I also disagree with the submission that the RAD's finding was based on the type of "inverted reasoning" rejected in *Chen v Canada (Citizenship and Immigration)*, 2013 FC 311 at para 20. Unlike in *Chen*, the RAD did not reach a conclusion based only on some evidence and then reject the remainder based on its inconsistency with that conclusion. It rejected the affidavits based on the collective implausibility of the events described occurring immediately after the RPD decision.

[27] The RAD also rejected the two emails that were presented after perfection of the appeal on grounds of credibility. These consisted of:

- an email exchange in which Mr. Idugboe's sister asks Mrs. Idugboe as "a favour" to return to Nigeria, even though her life is in danger, because Mr. Idugboe's family had a "family meeting" in which he was given 3 months to present Mrs. Idugboe and her daughter or be expelled from the family, and the resulting stress on Mr. Idugboe's mother was affecting her health; and

- an email from Mrs. Idugboe's brother saying that unidentified members of Mr. Idugboe's family had come to their father's house, threatened Mrs. Idugboe, and attacked the

brother because he refused to disclose her whereabouts, resulting in his hospitalization. The email attached photographs of the brother purporting to show his injuries.

[28] The RAD again found that the emails met the legislative requirements of subsection 110(4), but refused to admit them as they were not credible based on the "source and circumstance of the events described." In particular, the brother's email was found to lack specificity as to who assaulted him or how; and the "family meeting" described in the sister-in-law's email was considered improbable both in terms of timing and in the context of the family's respective positions on FGM. The two emails were also criticized as being "too fortuitous and contrived" and "highly unlikely" given that they represented a new cluster of events occurring within 24 hours of each other.

[29] The RAD also found the source of the emails lacking in credibility since both came from affiants whose evidence had already been rejected: the brother had sworn one of the affidavits rejected for the credibility reasons discussed above; the sister-in-law had provided an affidavit with respect to the family's presence in Port Harcourt that had been rejected as the evidence was previously available and the affidavit therefore did not comply with subsection 110(4).

[30] I disagree with the Idugboes that it is unreasonable for the RAD to rely on the brother's earlier affidavit as part of its assessment of the credibility of the brother's email. It is true that a lack of credibility with respect to one aspect of a witness's evidence does not necessarily require rejection of all of that witness's evidence: *Isakova v Canada (Citizenship and Immigration)*, 2008 FC 149 at para 17. However, the rejection of a witness's affidavit on grounds of credibility

is a reasonable matter to consider as part of assessing the source of subsequent evidence from that witness.

[31] The same cannot be said for the RAD's reliance on the rejection of the sister-in-law's earlier affidavit. That affidavit was rejected not because it was not credible, but because it did not comply with the requirement in subsection 110(4) that the evidence "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." The fact that certain evidence from a witness is not admissible on appeal because of timing issues provides no grounds for assailing the credibility of further evidence from that witness.

[32] Nevertheless, the rejection of the earlier affidavit of the sister-in-law was only a minor part of the RAD's basis for rejecting her later email. The RAD relied on both the timing of the new "cluster of events" and the contents of the email considered in light of the overall evidence presented at the RPD. The RAD noted the improbability of the alleged family meeting, and that it was "perplexing" that threats and violence would ensue in September 2018 when the Idugboes had not seen or heard from Mr. Idugboe's family since 2014. Recognizing the deference that is to be given to credibility findings, I am satisfied that the RAD's assessment of the credibility of the sister-in-law's email is reasonable as a whole, despite the inappropriate reliance on the rejection of her earlier evidence for timing reasons.

(2) The RAD was not required to hold a hearing

[33] The Idugboes argue that it was unfair not to hold an oral hearing before rejecting the foregoing evidence on credibility grounds. As noted above, subsection 110(6) of the *IRPA* states that the RAD may hold a hearing if there is new evidence that raises a serious issue with respect to the credibility of the person who is the subject of the appeal; that is central to the decision; and that, if accepted, would justify allowing or rejecting the refugee protection claim. While the RAD retains a discretion, a hearing must generally be held where these statutory requirements are met: *Zhuo v Canada (Citizenship and Immigration)*, 2015 FC 911 at paras 9–11.

(a) *Standard of review*

[34] Whether a hearing ought to be held is a question of procedural fairness. On judicial review, such matters typically attract a "fairness" standard akin to correctness, in which the Court assesses whether the procedure is fair in all the circumstances: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54. At the same time, the Idugboes submit that the obligation on the RAD is to "consider and apply the statutory criteria reasonably": *Zhuo* at para 11; *Boyce v Canada (Citizenship and Immigration)*, 2016 FC 922 at paras 46–48.

[35] Justice O'Reilly's conclusion in *Zhuo* that a hearing is generally required when the statutory criteria have been satisfied was based on analogy to the approach this Court has taken to hearings in the context of a pre-removal risk assessment (PRRA) under subsection 113(*b*) of the *IRPA* and section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-

227 [*IRPR*]: *Zhuo* at paras 10–11; *Strachn v Canada (Citizenship and Immigration)*, 2012 FC 984 at paras 32–34. The very similar statutory language applicable in the two cases suggests the same approach to their application: *Singh* at para 40. It also suggests that the same standard of review ought to apply.

[36] However, in the PRRA context, whether this determination is reviewable on a correctness or reasonableness standard remains "unsettled": *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at paras 12–17; *Khan v Canada (Citizenship and Immigration)*, 2019 FC 1515 at paras 34–39. In essence, some decisions consider the matter to be one of procedural fairness, thus attracting a "fairness" or "correctness" standard; while others have concluded that since the issue involves the interpretation and application of the *IRPA* and the *IRPR*, the reasonableness standard should apply: *Khan* at para 35. Although I do not believe that the standard of review affects the outcome in this case, I make the following observations.

[37] As a general matter, the legislature may define procedural fairness requirements and such statutory requirements will prevail over common law principles of natural justice: *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at paras 19–22. However, the fact that there are procedural requirements in a statute does not itself make the matter one of legislative interpretation subject to the deferential reasonableness standard. This can be seen from the Supreme Court of Canada's decision in *Khela*, which reiterated that the "correctness" standard applied to procedural fairness issues, even though the question in that case was the interpretation and application of a statutory procedural right to disclosure: *Mission Institution v Khela*, 2014 SCC 24 at paras 79–85; see also *Canadian*

Pacific at paras 34–36, 81–92, in which the fairness issues included the Canada Transportation Agency's reliance on a statutory duty to make a decision within a fixed time period.

[38] It is worth noting that procedural issues are treated together under paragraph 18.1(4)(*b*) of the *Federal Courts Act*, RSC 1985, c F-7, whether they arise as a principle of natural justice or procedural fairness, or as an "other procedure that [the tribunal] was required by law to observe": *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; see also *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 77, noting that procedural fairness, a matter treated outside the standard of review analysis, is at issue "where an administrative body may have prescribed rules of procedure that have been breached." This being so, it would seem unusual to apply different standards of review on a judicial review under section 18.1 depending on whether the fairness issue arose at common law or under statute.

[39] I therefore conclude that the issue is one of "fairness" rather than "reasonableness" in the sense that term is used in the context of substantive review on the merits: *Vavilov* at para 23; *Canadian Pacific* at paras 52–56.

[40] Nonetheless, some aspects of procedural fairness may involve an exercise of discretion by the administrative decision maker that is entitled to deference. This includes cases where a statutory procedural requirement expressly includes an element of discretion (*e.g.*, *Khela* at para 89; *Canadian Pacific* at paras 42–43, 84), or where the procedural issue is inherently discretionary, such as granting an adjournment (*e.g.*, *Wagg v Canada*, 2003 FCA 303 at paras 19,

22, 26). In either case, the question remains "whether the procedure was fair having regard to all of the circumstances": *Canadian Pacific* at para 54.

(b) *Application of the fairness standard*

[41] In assessing whether the procedure was fair having regard to all of the circumstances, the "circumstances" necessarily include any applicable statutory procedural requirements. Here, section 110 sets out circumstances when the RAD "may" hold a hearing, and prohibits a hearing if those circumstances are not present: *IRPA*, s 110(3), (6). One of the requisite circumstances is that the new documentary evidence "raises a serious issue with respect to the credibility of the person who is the subject of the appeal": *IRPA*, s 110(6)(*a*). While the RAD rejected the four affidavits and the two emails on grounds of credibility, the credibility findings pertained to the authors of the documents and the contents of the evidence, and did not relate, either directly or indirectly, to the Idugboes who were the "subject of the appeal."

[42] As Justice Norris has observed in the analogous PRRA context, while it can be difficult to draw a bright line, "doubts about the veracity of evidence do not necessarily amount to concerns about an applicant's credibility": *Ahmed v Canada (Citizenship and Immigration)*, 2018 FC 1207 at para 32. Although Mrs. Idugboe gave evidence before the RPD regarding her fears of her ex-husband's family, her factual evidence was not questioned by either the RPD or the RAD, and the new evidence from third parties recounting new incidents allegedly occurring in Nigeria while Mrs. Idugboe was in Canada does not impact Mrs. Idugboe's credibility.

[43] I also agree with the Minister that this evidence was not evidence "central to the decision" that, if accepted, would "justify allowing or rejecting the refugee protection claim," and therefore did not meet the other requirements of subsection 110(6). The evidence that was rejected on credibility grounds spoke to new instances of threats and attacks, none of which would have affected the determinative IFA issue. While the evidence arguably speaks to the motivation of Mr. Idugboe's family to find the Idugboes on their return, the IFA determination was based on a variety of factors, including their means and ability to locate the Idugboes in Port Harcourt, none of which was affected by this newly tendered evidence.

[44] The Idugboes rely on *Gbemudu v Canada (Citizenship, Refugees and Immigration)*, 2018 FC 451 and *Horvath v Canada (Citizenship and Immigration)*, 2018 FC 147 in support of their contention that an oral argument ought to have been granted. Neither case assists the Idugboes. While Justice Russell in *Gbemudu* did say that some of the credibility concerns regarding the new affidavit tendered in that case could have been answered by giving the applicant an opportunity to address them, his conclusion that the RAD's credibility finding was unreasonable was based on the reasons given by the RAD for the finding, and not because of the fairness issue: *Gbemudu* at paras 75–83. Nor was Justice Russell called upon to address whether the affidavit raised an issue of credibility of the applicant. In *Horvath*, the credibility issue both related directly to the applicant and arose from evidence that had been admitted by the RAD, making the situation very different from that of the Idugboes: *Horvath* at paras 8, 19.

[45] In light of the statutory requirements, I cannot conclude that the RAD's decision not to hold a hearing before making the determinations of credibility and rejecting the new evidence on that ground was unfair having regard to all of the circumstances.

B. *The RAD's Rejection of the Medical Evidence*

[46] The RAD rejected the two letters tendered pertaining to the son's medical issues for failing to meet the requirements of subsection 110(4), since the evidence was reasonably available to the Idugboes before the rejection of their claim and they could have reasonably been expected to present it to the RPD.

[47] The refusal to admit new evidence based on subsection 110(4) of the *IRPA* might be considered an issue of procedural fairness (see, *e.g.*, *Ghannadi v Canada (Citizenship and Immigration)*, 2014 FC 879 at paras 14–19), and thus attract a "fairness" standard for the reasons discussed above. However, the Federal Court of Appeal has concluded clearly that the reasonableness standard is applicable to the RAD's interpretation and application of subsection 110(4): *Singh* at paras 23, 29.

[48] As set out above, the RPD considered the son's health condition in assessing Port Harcourt as a viable IFA, noting that there was no evidence that his condition rose to the level of risk in which his life is in danger. Rather, the evidence showed that the son had been able to obtain medical treatment for his condition in Nigeria as needed.

[49] In apparent response to this, the Idugboes sought to file before the RAD a letter from the Children's Hospital at the London Health Sciences Centre where the son is being treated, which speaks to the son's condition and the importance of proper care; and a letter from the Delta State Hospitals Management Board, which speaks to the poor medical facilities and high costs of care in Nigeria, including a difficulty in obtaining medicine to treat sickle cell disease.

[50] In support of admission of this evidence, Mrs. Idugboe stated that her previous counsel failed to advise her that filing evidence post-hearing was allowed, and that had she been aware of the concerns of the RPD she would have "taken steps." Nor did her former counsel advise her to bring in medical documents regarding her son's health.

[51] The RAD found that the son's condition was already before the RPD, having been raised as part of the Idugboes' case. It found that the medical evidence was available and could reasonably have been expected to be presented before the rejection of the claim, even after the hearing at which Port Harcourt was raised as a potential IFA. The RAD also rejected the Idugboes' argument that previous counsel was to blame for not filing such evidence earlier, noting that no complaint had been made against former counsel, nor were they given any notification or opportunity to respond. The Idugboes argue that both of these conclusions were unreasonable.

[52] On the former point, the Idugboes argue that the evidence was put forward as directly responsive to issues raised in the RPD's IFA analysis and could not therefore have been provided earlier. They argue that it was unreasonable for the RAD to reject the evidence as not being new.

[53] I disagree. The RPD's IFA analysis considered and responded to allegations put forward by the Idugboes at the hearing as to why Port Harcourt was not a viable IFA. This included the issue of the son's health, a matter raised by the Idugboes and not the RPD. Having raised this issue as relevant to the IFA, it was incumbent on the Idugboes to put forward evidence on that issue, either at or subsequent to the hearing. The RPD undertook its analysis based on the evidence and submissions before it, and concluded that there was insufficient evidence regarding the son's health to meet the IFA standard of unreasonableness. In this context, the fact that the evidence was filed to respond to the RPD's analysis does not make the evidence new or mean that it could not have been filed before the RPD. As the Minister notes, the role of the RAD is not to provide the opportunity to complete a deficient record before the RPD: *Singh* at para 54.

[54] On the latter point, the Idugboes argue that the Immigration and Refugee Board's *Practice Notice—Allegations Against Former Counsel* only came into effect on September 10, 2018, three months after the medical evidence was filed, so it should not be considered applicable. The Minister responds that the Idugboes filed further new evidence in October, and the RAD did not render its decision until November 2, 2018, such that there was ample opportunity to advise former counsel of the allegation of incompetence.

[55] The Minister's submissions regarding the timing of the *Practice Notice* and the opportunity to advise former counsel are persuasive. In any event, the issuance of the *Practice Notice* was not the first time the need to notify prior counsel of allegations of incompetence arose. Even before the *Practice Notice*, the RAD had adopted an approach requiring former counsel to be put on notice, a practice sufficiently recognized for the RAD to

observe that "[a]ll applicants and their counsel must be assumed to know": see *X (Re)*, 2017 CanLII 142912 (CA IRB) at paras 25–26, 38–40, citing *Pathinathar v Canada (Citizenship and Immigration)*, 2013 FC 1225 at para 25.

[56] The RAD did not refer to or rely on the *Practice Notice* in its decision with respect to the Idugboes, and may be taken to have simply applied its pre-existing approach. This is a fair and reasonable approach given the prior practice and the importance of notifying former counsel to permit the RAD to assess allegations of incompetence.

[57] The RAD's rejection of this evidence on the basis that it was not new, and that the allegations regarding former counsel were inadequate to explain why the evidence was not previously filed, was therefore reasonable.

C. *The IFA Determination*

[58] Finally, the Idugboes argue that the RAD's determination that Port Harcourt was a viable IFA was unreasonable. The RAD's assessment that there is an IFA is a question of mixed fact and law reviewable on a reasonableness standard: *Okohue v Canada (Citizenship and Immigration)*, 2016 FC 1305 at para 10; *Vavilov* at para 25.

[59] In assessing whether there is a viable IFA, the RAD must be satisfied, on a balance of probabilities, that (1) there is no serious possibility of the claimant being persecuted in the proposed IFA; and (2) in all the circumstances, including circumstances particular to the claimant, conditions in the IFA are such that it would not be unreasonable for the claimant to

seek refuge there: *Rasaratnam* at p 711. Although the *Rasaratnam* analysis is directly applicable only to a Convention refugee claim under section 96, the requirement in subparagraph 97(1)(*b*)(ii) that a person in need of protection face the identified risk "in every part of that country" means that an IFA negates a claim for refugee protection under either section 96 or 97: *Sanchez v Canada (Citizenship and Immigration)*, 2007 FCA 99 at para 16; *Barragan Gonzalez v Canada (Citizenship and Immigration)*, 2015 FC 502 at paras 45–46.

[60] The Idugboes argue that the RAD's assessment of the second prong of the IFA analysis was unreasonable, particularly as it related to the son's condition and the adequacy of health care available in Port Harcourt. While the Idugboes rely primarily on the RAD's rejection of the new medical documents, addressed above, they also contend that the RAD's analysis of the second prong of the IFA test inadequately addressed the evidence regarding health care in Nigeria generally and Port Harcourt in particular.

[61] The RAD conducted its own assessment of the evidence regarding access to and quality of health care in Nigeria. I am satisfied that this assessment, while brief, was reasonable.

[62] The RAD considered the general evidence regarding health care, noting that the evidence was silent on the specific needs of those suffering from sickle cell disease. The RAD referred to the constitutional goal of universal access to health care in Nigeria, but also recognized the "ample evidence of this falling short in practice." At the same time, the RAD noted that the evidence described publicly funded health care, and providers in the non-profit and private sectors. The RAD found that while not meeting American standards of care, access to care was

available. It therefore concluded that the son's health status and resulting access to medical care did not suggest that the IFA was unreasonable in his particular circumstances.

[63] I do not consider the RAD's assessment of health care to have been inappropriately selective, or to have failed to analyze the practical implications of shortcomings in the health care system. In the context of the high threshold for the unreasonableness test in the second prong of the IFA analysis and in the absence of medical evidence regarding the son's medical needs and their availability—evidence that could have been filed with the RPD but was not—the RAD's analysis of the available medical evidence and its assessment of Port Harcourt as an IFA was reasonable.

[64] The Idugboes also argue that the RAD unreasonably failed to assess evidence regarding the treatment of those who are non-indigene of Port Harcourt, the difficulties finding employment outside the oil sector, and the difficulties facing single women who run their own households. They point to *Okoloise v Canada (Citizenship and Immigration)*, 2018 FC 1008 at paragraphs 11–18, in which such issues were considered.

[65] The primary difficulty with this argument is that the Idugboes did not raise these issues with the RAD. Rather, their submissions regarding the IFA focused on the risks of continued persecution by the ex-husband's family and, secondarily, the health issues related to the son's condition. The RAD reasonably addressed the concerns that the Idugboes raised as relevant to the IFA assessment. It also noted that no challenge had been raised with respect to the RPD's assessment of Mrs. Idugboe's gender, family status, education and past employment in the IFA

analysis. The RAD cannot be faulted for not addressing issues on which neither evidence nor submissions were filed by the parties before it.

[66] I therefore find the RAD's analysis of whether Port Harcourt is a viable IFA for the Idugboes to be reasonable.

VI. Conclusion

[67] The RAD's refusal to accept the new evidence proffered by the Idugboes on appeal was reasonable. The RAD's assessment of whether Port Harcourt was a viable IFA for the family, conducted in the absence of the new evidence, was similarly reasonable, as was the resulting determination that the Idugboes are not Convention refugees nor persons in need of protection. The application for judicial review is therefore dismissed.

[68] Neither party proposed a question for certification. I agree that none arises. No question is therefore certified.

JUDGMENT IN IMM-5916-18

THIS COURT'S JUDGMENT is that

1. This application for judicial review is dismissed.

"Nicholas McHaffie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5916-18
STYLE OF CAUSE:	CORDILIA IDUGBOE ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	AUGUST 19, 2019
JUDGMENT AND REASONS:	MCHAFFIE J.
DATED:	MARCH 4, 2020

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