

Federal Court



Cour fédérale

Date: 20201102

Docket: IMM-345-20

Citation: 2020 FC 1025

Ottawa, Ontario, November 2, 2020

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

JOHN ESSEL

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Mr. Essel is seeking judicial review of the dismissal of his claim for asylum. He argues that the decision-maker committed a number of errors with respect to the assessment of Internal Flight Alternatives [IFA]. I am dismissing his application. Overall, the decision was reasonable. In addition, Mr. Essel invokes several arguments he did not raise before the decision-maker, who cannot be faulted for not considering them.

I. Background

[2] Mr. Essel is a citizen of Ghana. He came to Canada in 2017 and made a claim for asylum. He alleges that, due to a dispute regarding property of certain lands, his stepmother falsely told the community chief that he is homosexual. As a result, in December 2014, he and his friends were beaten by a group of people whom he believes were sent by the chief. After this incident, he left his hometown and went to live for a few months with an acquaintance in Accra. He left Ghana in April 2015, spending time in various countries before making his way to Canada in October 2017.

[3] The Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] dismissed Mr. Essel's claim. It found that Mr. Essel has an IFA in Accra, Kumasi or Cape Coast, because there was insufficient evidence that the alleged agents of persecution had the interest or capacity to harm him in the proposed IFAs and it was reasonable to require him to relocate to one of the IFAs.

[4] Mr. Essel appealed to the Refugee Appeal Division [RAD] of the IRB. The RAD accepted new evidence: three paragraphs of an affidavit sworn by Mr. Essel's brother and a November 2018 letter from the Western Regional House of Chiefs to Mr. Essel's uncle, containing threats against Mr. Essel. The affidavit alludes to the fact that the youth of Mr. Essel's community went to Accra and found the acquaintance with whom he was living. It is unclear from the record when this event took place.

[5] The RAD dismissed the appeal, agreeing with the RPD's IFA finding, although not with respect to Accra, as the new evidence suggested that the agents of persecution had located Mr. Essel there. The RAD nevertheless found that there was insufficient evidence that they had the capacity or interest to pursue Mr. Essel in Kumasi or Cape Coast. It also found that it was reasonable to require Mr. Essel to move to one of these two cities.

[6] Mr. Essel now seeks judicial review of the RAD's decision. He also seeks an extension of time for filing his application, because his former lawyer did not file the application on time, despite assurances given to Mr. Essel that he had done so.

II. Extension of Time

[7] I am granting Mr. Essel's request for an extension of time. There is no dispute that he has always had a continuing intention to file this application. The fact that leave was granted shows that the application has at least some merit, even though I am ultimately dismissing it. In the circumstances, it was reasonable for Mr. Essel to rely on his former counsel's assurances that the application had been filed in time. While there is a certain form of prejudice in the lack of finality of decisions that results from late applications, I find that in the present situation, the other factors have more weight. I would simply add that this is not a situation in which the delay results from the negligence of Mr. Essel's current counsel.

III. Analysis

[8] This Court reviews decisions of the IRB on a standard of reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov]. On issues of fact, this Court intervenes only in “exceptional circumstances” (Vavilov, at paragraph 125), namely, where “the decision maker has fundamentally misapprehended or failed to account for the evidence before it” (Vavilov, at paragraph 126). It is not enough for the applicant to highlight an isolated erroneous statement if, on the whole, the main findings are justified.

[9] The issue must be analyzed while keeping in mind that the applicant bears the burden of proving his claim for asylum before the RPD. This includes the burden of proving that the test for an IFA is not met. It does not assist the applicant to engage in speculation regarding the risk to which he would be exposed in a specific IFA if there was no evidence before the RPD in this regard.

[10] Moreover, an application for judicial review cannot be based on grounds that could have been raised before the RAD, but were not: *Canada (Citizenship and Immigration) v RK*, 2016 FCA 272, at paragraph 6; *Adams v Canada (Citizenship and Immigration)*, 2018 FC 524, at paragraphs 28–29.

[11] As I mentioned above, both the RPD and RAD denied Mr. Essel’s claim for asylum on the basis of an IFA. In doing so, they applied the well-known test for an IFA, established by the

Federal Court of Appeal in *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (CA), among other cases.

[12] I fail to discern any unreasonable error in the RAD's treatment of the evidence.

[13] Mr. Essel first argues that the RAD erred in stating that he was found in Accra through a "work colleague," as there is simply no evidence of how he was found. This error would invalidate the RAD's deduction that Mr. Essel would not be at risk in Kumasi or Cape Coast because his employer does not have places of business there. This alleged fault in the RAD's reasoning, however, does not affect the RAD's overall findings. The RAD concluded that Mr. Essel failed to provide sufficient evidence that the agents of persecution had the interest or capacity to pursue him outside their region. The incident in Accra is described in a single paragraph of Mr. Essel's brother's affidavit. We do not know how the agents of persecution located Mr. Essel's acquaintance. Speculating that they must have heard "rumors," or that the employer, an engineering firm, must be doing business everywhere in the country, does not assist Mr. Essel. The fact that the agents of persecution were apparently able to locate him in Accra does not negate the RAD's finding that they would not have the capacity or interest to do so elsewhere in the country. There is no presumption of fact to the contrary: *Akinkunmi v Canada (Citizenship and Immigration)*, 2020 FC 742 at paragraphs 25–27. In any event, such presumption was not argued before the RAD.

[14] Second, Mr. Essel argues that the RAD failed to assess the risk of persecution at the hands of his stepmother, but rather focused on the risk posed by the "intermediaries" used by the

stepmother. There is no evidence, however, that the stepmother has means to harm Mr. Essel other than through the intermediaries who were the subject of the RAD's analysis. It bears repeating that Mr. Essel had the burden of proof in this regard. He cannot complain that the RAD did not engage in a separate analysis of the threat posed by his stepmother if there is no evidence in this regard, especially as he failed to ask the RAD to consider this specific issue.

[15] Third, Mr. Essel argues that a different IFA test should be applied when the agent of persecution is a family member. An asylum claimant, he says, should not be expected to cut off all ties with his family. Yet, maintaining such ties may help the agent of persecution find him. I note, however, that this argument was not made before the RAD. Thus, the RAD cannot be faulted for failing to consider it. In any event, Mr. Essel's argument, if it is meant to establish a general rule, would totally foreclose the possibility of an IFA when the agent of persecution is a family member. This Court has held that there is not a different test for an IFA when the agent of persecution is a family member: *Agbeja v Canada (Citizenship and Immigration)*, 2020 FC 781 at paragraphs 41–42. If, on the other hand, the argument pertains to Mr. Essel's individual situation, he provided no evidence in this regard.

[16] Fourth, according to Mr. Essel, the RAD unreasonably failed to acknowledge this Court's decision in *Annan v Canada (Minister of Citizenship and Immigration)*, [1995] 3 FC 25 at 30 (TD), which stated that "Ghana is a small country." This issue is a distraction. A similar argument was dismissed in *Cruz v Canada (Citizenship and Immigration)*, 2020 FC 22 at paragraphs 24–27. What matters is not that the RAD acknowledge the size of the country, but that it perform an adequate analysis of the risk of persecution in the alleged IFAs. Mr. Essel

failed to show that the RAD came short of that standard. In any event, Mr. Essel did not ask the RAD to give specific consideration to the small size of Ghana.

IV. Disposition

[17] For the foregoing reasons, an extension of time is granted, but the application for judicial review is dismissed.

JUDGMENT in file IMM-345-20

THIS COURT'S JUDGMENT is that:

1. The application for extension of time is granted.
2. The application for judicial review is dismissed.
3. No question is certified.

"Sébastien Grammond"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-345-20

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AND IMMIGRATION

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APPEARANCES:

David Matas FOR THE APPLICANT

Darren Grunau FOR THE RESPONDENT

SOLICITORS OF RECORD:

David Matas FOR THE APPLICANT
Barrister and Solicitor
Winnipeg, Manitoba

Attorney General of Canada FOR THE RESPONDENT
Winnipeg, Manitoba