Federal Court Cour fédérale

Date: 20210201

Docket: IMM-7467-19

Citation: 2021 FC 109

Ottawa, Ontario, February 1, 2021

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

AKINKUNMI OLUSIMBO OGUNJINMI
THERESA AJOKE OGUNJINMI
OKWUKWE SCHOLASTICA OGUNJINMI
JOSE-MARIA AKINLOLUWA OGUNJINMI
CLARE ANJOLAOLUWA OGUNJINMI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Akinkunmi Olusimbo Ogunjinmi [Principal Applicant], his wife Okwukwe Scholastica Ogunjinmi, their minor son Jose-Maria Akinloluwa Ogunjinmi (born 2003), and their minor

daughters Theresa Ajoke Ogunjinmi (born 2005) and Clare Anjolaoluwa Ogunjinmi (born 2010), are citizens of Nigeria. They seek judicial review of a decision by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board [IRB]. The RAD determined that the Applicants are neither Convention refugees nor persons in need of protection pursuant to ss 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [IRPA].

[2] The Applicants claim to fear persecution by members of the Principal Applicant's family, who insist that the daughters undergo female genital mutilation [FGM] in keeping with their traditional beliefs and practices. The RAD concluded that the Applicants have internal flight alternatives [IFAs] in Abuja, Port Harcourt and Benin City, and therefore do not require Canada's protection.

[3] The Applicants raised only one issue before the RAD: whether relocation to any of the proposed IFAs would be unduly harsh or objectively unreasonable. The RAD concluded that none of the potential hardships alleged by the Applicants met the very high threshold for rebutting the presumption that the proposed IFAs are viable.

[4] Before this Court, the Applicants advance a number of arguments that were never presented before the RAD. Some of these arguments lack supporting evidence. Despite being represented by counsel, the Applicants appear to misunderstand the role and function of this Court in an application for judicial review.

[5] The Applicants have not identified any reviewable error in the RAD's analysis of the arguments and evidence it was asked to consider. The application for judicial review is therefore dismissed.

II. Background

[6] The adult Applicants say that their first daughter was subjected to FGM without their consent when she was two years old. A certificate of death dated December 19, 2018 states that the daughter died on November 26, 2002. A separate document dated October 20, 2018, titled Medical Certificate of Cause of Death, states that the primary cause of death was tetanus, and the secondary cause was circumcision.

[7] Following the death of their first daughter, the Applicants relocated from Ikire to Ile-Ife, approximately 50 kilometres away. According to the Principal Applicant, after Theresa was born in 2005 he received a message from his father that she should undergo FGM. This did not occur, and the family continued to live in Ile-Ife without incident until 2015, when they say a visiting family member insisted that Theresa and Clare undergo FGM.

[8] Two years later, in 2017, the Applicants obtained visitor visas for the United States of America. Akinkunmi and Theresa arrived in the United States on August 12, 2017. The other Applicants followed on December 10, 2017.

[9] Akinkunmi and Theresa entered Canada on November 13, 2017. The other Applicants entered Canada on December 15, 2017. They all submitted claims for refugee protection in early 2018.

[10] The claims were heard by the Refugee Protection Division [RPD] of the IRB on January 28, 2019. The RPD held that there was no reason to doubt the Applicants' story, and acknowledged the hardships experienced by the Applicants following the loss of their first child. However, the RPD found that these hardships were not in themselves sufficient to overcome the existence of IFAs in Kano, Abuja, Port Harcourt and Benin City.

[11] The Applicants appealed the RPD's decision to the RAD. In their Memorandum of Argument submitted to the RAD, the Applicants identified "The Issue" as follows (at paras 14-15):

> **THE ISSUE**
>
> 14. Did the RPD err in its finding that the appellants have a viable IFA in Nigeria?
>
> 15. Did new evidence become available after the date of the RPD decision, that demonstrates that the appellants do not have a viable IFA in Nigeria?

[12] The Applicants narrowed the issue respecting the viability of the IFAs to only the second prong of the test, *i.e.*, whether it would be unreasonable, in all of the circumstances, for them to seek refuge there (at para 25):

> With respect to the two-prong test for IFA, the appellants submit that the proposed IFAs do not meet the second prong of the test. The proposed IFA are unreasonable because the conditions in those locations, based on the recent travel advisories, are such that they would jeopardize the life and safety of the appellants.

[13] The RAD accepted as new evidence travel advisories for Nigeria issued by Canada, the United Kingdom and New Zealand. The RAD nevertheless concluded that the Applicants have viable IFAs in Abuja, Port Harcourt and Benin City. The RAD overturned the RPD's finding that the Applicants also have a viable IFA in Kano, because this was inconsistent with the Jurisprudential Guide designated by the Chairperson of the IRB pursuant to s 159(1)(h) of the IRPA respecting IFAs in major cities in south and central Nigeria.

III. Issues

[14] This application for judicial review raises the following issues:

A. Can arguments that were not presented before the RAD be raised for the first time on judicial review?

B. Was the RAD's decision reasonable?

IV. Analysis

A. *Can arguments that were not presented before the RAD be raised for the first time on judicial review?*

[15] An appeal before the RAD is directed towards the decision of the RPD. Unless new evidence is accepted, the appeal is to be decided on the basis of the record as it existed at the time of the RPD's decision. The RAD should concern itself only with the errors of law, of fact, or of mixed fact and law that the appellant says were committed by the RPD (*Dhillon v Canada (Citizenship and Immigration)*, 2015 FC 321 [*Dhillon*] at para 18).

[16] The RAD has no duty to speculate as to what might have been a better approach to a failed refugee claimant's appeal, or to ultimately find that the claim should have been accepted based on risks that were not raised by the claimant in the first place. It is not the RAD's function to supplement the weaknesses of an appeal before it, or of the claim as initially presented. Nor is it the role of the RAD to come up with new ideas that might assist appellants in succeeding with their appeals and, ultimately, their refugee claims (*Dhillon* at para 19-20). Appellants who fail to specify where and how the RPD erred do so at their peril (*Broni v Canada (Citizenship and Immigration)*, 2019 FC 365 at paras 15-18, citing *Ghauri v Canada (Citizenship and Immigration)*, 2016 FC 548 at para 34).

[17] The following arguments were not presented by the Applicants before the RAD, and therefore cannot be raised for the first time in this application for judicial review:

(a) the RAD unreasonably used a white, Eurocentric mathematical model to conclude that the Applicants would be safe in the proposed IFAs;

(b) the RAD did not consider the mathematical likelihood that the Applicants would be identified in the proposed IFAs;

(c) the RAD failed to consider cultural differences that exist in Nigeria, and the belief system of similarly-situated indigenes;

(d) the RAD had a duty to inquire whether those who had subjected the Applicants' first-born daughter to FGM in 2002 had been brought to justice; and

(e) the RAD had a duty to inquire whether the traumatic circumstances surrounding the death of the Applicants' daughter in 2002 constituted "compelling reasons" to allow their refugee claims under s 108(4) of the IRPA.

[18] The first and second arguments, which counsel for the Applicants also referred to as "white privilege" and "going viral", are unsupported by evidence. While there was some evidence before the RAD concerning cultural differences between groups of indigenes, the Applicants based their appeal primarily on travel advisories issued by the governments of Canada, the United Kingdom and New Zealand for the benefit of their own nationals. Not surprisingly, none of the advisories addressed the challenges that might be faced by some indigenes in relocating to an area dominated by indigenes who are culturally distinct.

[19] The RAD had no duty to inquire whether those who had subjected the Applicants' first-born daughter to FGM in 2002 had been brought to justice. Nor was the RAD under any obligation to consider "compelling reasons" under s 108(4) of the IRPA. Furthermore, as the Respondent points out, this argument contradicts the Applicants' assertion that they continue to be at risk of persecution in Nigeria.

[20] Subsection 108(4) of the IRPA applies only when a claimant was previously a Convention refugee, but is no longer in need of protection due to changed circumstances in the country of origin. The provision permits the IRB to consider whether there are "compelling reasons" to extend protection to that claimant, even though there is no longer any danger in the country of origin (see *Zuniga v Canada (Citizenship and Immigration)*, 2020 FC 488 and the cases cited therein).

[21] The RAD cannot be faulted for failing to consider arguments that were never put to it (*Dakpokpo v Canada (Citizenship and Immigration)*, 2017 FC 580 at para 14). The Applicants' failure to adduce evidence and present their arguments before the RAD precludes them from advancing them for the first time in this application for judicial review.

B. *Was the RAD's decision reasonable?*

[22] The RAD's decision is subject to review by this Court against the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 10). The Court will intervene only if "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100). These criteria are met if the reasons allow the Court to understand why the decision was made, and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law (*Vavilov* at paras 85-86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[23] The test for a viable IFA is well-established (*Rasaratnam v Canada (Minister of Employment & Immigration)*, [1992] 1 FC 707 (FCA) at paras 5-6, 9-10): first, the IRB must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the part of the country where it finds an IFA to exist; and second, conditions in that part of the country must be such that it would not be unreasonable, in all the circumstances, for the claimant to seek refuge there. Both prongs of the test must be satisfied.

[24] Before the RAD, the Applicants did not challenge the RPD's finding that the first prong of the test was met. The sole issue raised by the Applicants concerned the second prong of the test: whether it was objectively unreasonable, in all the circumstances, to expect the Applicants to relocate to any of the proposed IFAs.

[25] Based on the travel advisories that were accepted as new evidence, the Applicants argued that relocation to any of the proposed IFAs would jeopardize their lives and safety. The Applicants cited the proximate location of Benin City to their home community; the high cost of living in large Nigerian cities; and their lack of financial resources to re-establish themselves.

[26] Once the possibility of an IFA has been raised and a potential IFA has been identified, the burden of proof rests with a claimant to demonstrate that the IFA is unsuitable (*Thirunavukkarasu v Canada (Minister of Employment & Immigration)*, [1994] 1 FC 589 (FCA) at para 5). It is difficult to rebut the presumption that a proposed IFA is viable. As the Federal Court of Appeal explained in *Ranganathan v Canada (Minister of Citizenship & Immigration)*, [2001] 2 FC 164 (FCA) at paragraph 15:

> It requires nothing less than the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to a safe area. In addition, it requires actual and concrete evidence of such conditions. The absence of relatives in a safe place, whether taken alone or in conjunction with other factors, can only amount to such condition if it meets the threshold, that is to say if it establishes that, as a result, a claimant's life or safety would be jeopardized. This is in sharp contrast with undue hardship resulting from loss of employment, loss of status, reduction in quality of life, loss of aspirations, loss of beloved ones and frustration of one's wishes and expectations.

[27] The arguments presented by the Applicants before the RAD regarding the unsuitability of the proposed IFAs concerned their employment prospects and inability to secure accommodation. The RAD reasonably found that these were insufficient to demonstrate that the proposed IFAs were not viable. Humanitarian and compassionate considerations, such as the loss of a job, a reduction in the quality of life, or the loss of aspirations, will not suffice (*Assaf v Canada (Citizenship and Immigration)*, 2016 FC 660 at para 21).

[28] The RAD held that the risks identified in the travel advisories relied upon by the Applicants were generalized, and would be faced by all Nigerians in the proposed IFAs. Both of the adult Applicants are university-educated and bilingual in English and Yoruba. Given their qualifications and work history, the RAD concluded that they would be able to secure both employment and accommodation in the proposed IFAs.

[29] The RAD's conclusion that the Applicants have viable IFAs in Nigeria, and are therefore not in need of Canada's protection, was reasonable. The application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7467-19
STYLE OF CAUSE:	AKINKUNMI OLUSIMBO OGUNJINMI, THERESA AJOKE OGUNJINMI, OKWUKWE SCHOLASTICA OGUNJINMI, JOSE-MARIA AKINLOLUWA OGUNJINMI AND CLARE ANJOLAOLUWA OGUNJINMI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE BETWEEN OTTAWA, WINDSOR AND TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 18, 2021
REASONS FOR JUDGMENT AND JUDGMENT:	FOTHERGILL J.
DATED:	FEBRUARY 1, 2021

APPEARANCES:

Mary Jane Campigotto	FOR THE APPLICANTS
Christopher Ezrin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Campigotto Law Firm Windsor, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT