Federal Court  Cour fédérale

Date: 20210127

Docket: IMM-4876-19

Citation: 2021 FC 90

Ottawa, Ontario, January 27, 2021

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

A.B., C.D. (MINOR), E.F. (MINOR), AND G.H. (MINOR)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants are Nigerian Citizens - a mother and three minor children - who seek to set aside a July 17, 2019 decision of the Refugee Appeal Division (RAD). The RAD dismissed their appeal and confirmed the October 31, 2018 decision of the Refugee Protection Division (RPD) that the Applicants are not Convention refugees pursuant to section 96 of the *Immigration*

and Refugee Protection Act, SC 2001, c 27 [the *IRPA*] nor are they persons in need of protection under subsection 97(1) of the *IRPA* (the Decision).

[2] The RPD found the allegations made by the Principal Applicant (PA) were not credible and alternatively, that the applicants had a viable internal flight alternative (IFA) in two different cities (IFA cities).

[3] The RAD, confirming the RPD's decision, found that the IFA was the determinative issue. After independently reviewing the record, the RAD found that the RPD did not err in its analysis that the proposed cities were viable IFAs.

[4] For the reasons that follow, this application is dismissed.

II. **Background**

[5] The Applicants based their refugee claim on a well-founded fear of persecution and the risk of being killed in Nigeria as the minor female Applicant was at risk of initiation into a pagan religious cult.

[6] The agents of persecution are the family of the PA's husband.

[7] The initiation, which had begun while visiting the husband's family, involved various rituals and female genital mutilation (FGM). The PA stopped the rituals and took her family back home.

[8] The PA and the other two minor Applicants fear they will be targeted for sacrifice and rituals because they did not submit the minor female Applicant for initiation.

[9] The Applicants and the husband of the PA left Nigeria for the United States after the PA received two threatening telephone calls. After receiving another telephone call while in the United States, the Applicants, entered Canada. The PA's husband did not accompany them.

III. **The Decision under Review**

[10] The RAD accepted new evidence from the uncle and mother of the PA pursuant to subsection 110(4) of the *IRPA*.

[11] The RAD did not accept a statutory declaration by the Principal Applicant explaining the PA's oral testimony and criticizing the RPD's reasoning after finding that it did not meet the requirements of subsection 110(4), because it was reasonably available at the time the claim was rejected.

[12] After finding that the new evidence was not central to the claim of the Applicants, the RAD denied the accompanying request for an oral hearing.

[13] The RAD noted that the determinative issue before the RPD was credibility but that the RPD found, in the alternative, there was a viable IFA.

[14] The RAD independently reviewed the record and found the determinative issue was that there was an IFA. The RAD accepted the statements of the Applicants about their personal experiences.

[15] The RAD also noted that the Jurisprudential Guide for Nigeria (JG TB7-19851) might be relevant on the facts. While it was not obliged to apply it, the RAD acknowledged that the RPD and the RAD were expected to apply it where the facts being considered were sufficiently close to those of JG TB7-19851. As the Applicants said that they fear members of a pagan religious cult, non-state actors, the RAD found that JG TB7-19851 might be relevant.

[16] On reviewing the evidence and considering the Applicants' arguments, the RAD determined, on a balance of probabilities, that there was no serious possibility of persecution in either of the IFA cities and there was no risk to life or cruel and unusual treatment or punishment, or danger of torture in either city. Essentially, the RAD found that there was no objective basis for the Applicants' subjective fear because although the agents of persecution might be motivated to find the Applicants, the efforts up to that time had been limited to harassing close family members.

[17] The RAD found that there was no evidence, other than the PA's own assertions, to show that the persecutory agent had the means to locate the Applicants the IFA cities. The RAD concluded that the agent of persecution was not capable of finding them in the IFA cities.

[18] The RAD noted that objective evidence pointing to crime such as kidnappings and robberies was evidence of a generalized risk of crime. The RAD found that the Applicants did not fit the profile of those at greater risk of these crimes such as wealthy families, politicians, doctors, teachers etc.

[19] The Applicants did not argue that they would face gender-based discrimination in either of the IFA cities. Noting this, the RAD found there would be no serious possibility of persecution due to their gender and no serious possibility of persecution nor risk to life or cruel and unusual treatment or punishment or danger of torture in either of the IFA cities.

[20] The Respondent conceded at the hearing of this matter that the RAD had erred in finding there was no objective evidence that the agents of persecution had any influence in one of the IFA cities as there was affidavit evidence to that effect. However, that finding did not extend to the other IFA city as the PA had testified that but for the agent of persecution she could live in the remaining IFA city. Therefore, going forward I will refer to the IFA city, rather than IFA cities.

IV. **Issues**

[21] The Applicants raise three issues.

[22] First, they say that they raised issues of procedural unfairness in their submissions to the RAD and the RAD failed to deal with them thereby implicitly accepting that the RPD breached the fairness rights of the applicants.

[23] Second, the Applicants challenge whether the RAD's decision that the Applicants had a viable IFA in the IFA city identified by the RPD was reasonable. They say that given the number of negative credibility findings made by the RPD before finding an IFA existed, the RAD either committed an error of law or was myopic in its consideration of the evidence.

[24] Third, the Applicants learned shortly before the hearing of this matter that the Jurisprudential Guide for Nigeria had been revoked and they state that on that basis alone the decision by the RAD ought to be set aside.

V. **Standard of Review**

[25] The Federal Court of Appeal has established that reasonableness is the standard of review to be applied by this Court to a decision of the RAD: *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at paragraphs 30, 35.

[26] Recently, the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] extensively reviewed the law of judicial review of administrative decisions. The Supreme Court confirmed that judicial review of an administrative decision is presumed to be on the standard of reasonableness, subject to certain exceptions which do not apply on these facts, and the burden is on the party challenging the decision to show it is unreasonable: *Vavilov* at paragraphs 23 and 100.

[27] Citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47 [*Dunsmuir*], it was also confirmed in *Vavilov* that a reasonable decision is one that displays justification, transparency

and intelligibility with a focus on the decision actually made, including the justification offered for it. To set a decision aside, a reviewing court must be satisfied that 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.

[28] Overall, a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker: *Vavilov* at paragraphs 15 and 85.

VI. **The RAD did not fail to address issues of Procedural Unfairness by the RPD**

[29] In their submissions to the RAD with respect to the issue of the procedural unfairness by the RPD, the Applicants put forward two grounds: (1) the manner by which the RPD assessed the evidence; and (2) that the RPD failed to consider the Gender Guidelines with respect to the Principal Applicant.

[30] The Applicants' complaint about the manner of assessing the evidence by the RPD was not specific other than the RPD had erred by failing to take into consideration "important variables in the IFA analysis". No specifics were provided. These allegations therefore amount, at best, to a disagreement with the weight assigned by the RPD. They do not support any finding of procedural unfairness nor was there anything for the RAD to address.

[31] With respect to the Gender Guidelines allegation, the submissions by the former counsel for the Applicants to the RPD did not address gender. Nonetheless the RPD indicated that it had

used the Gender Guidelines to help assess the claim. There is nothing procedurally unfair when the RPD takes the Gender Guidelines into account but does not address an argument that was not put forward.

[32] The RAD addressed the PA's argument that the RPD lacked sensitivity to the nature of her claim and that was contrary to the Gender Guidelines. The RAD found that since the IFA was determinative the only question was whether the RPD had applied the Gender Guidelines appropriately in its IFA analysis. The RAD concluded that the RPD made no such error as it took into account the circumstances of the Applicants, including gender.

[33] The RAD noted the RPD specifically asked counsel to make written submissions on the IFAs that it had explored during the hearing. The RAD found that the Applicants did not raise any gender specific concerns regarding the IFA city.

[34] The underlying record supports this finding by the RAD. The written submissions to the RPD, which I note were made by previous counsel, only addressed the risk of persecution to the Applicants and did so by generally recapping the evidence then suggesting the weight that ought to be assigned to it. The submissions did not address the IFA city. The only submission related to an IFA was the claim that the agents of persecution were part of a bigger network. No evidence, other than the Principal Applicant's assertion to that effect, was put before the RPD.

[35] Considering the above, I find that the Applicants have failed to show that the RAD erred with respect to any alleged issues of procedural unfairness made by the RPD.

VII. **The RAD's assessment of the IFA was Reasonable**

A. *Principles applicable to an IFA*

[36] In considering the viability of the IFA city, the RAD identified and applied the two-pronged test set out in *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (FCA).

[37] The first prong requires the Applicants to prove that there is a serious possibility of being persecuted in the IFA. In other words, the onus is on the Applicants to show they will be persecuted; it is not up to the Respondent to show they will not be persecuted.

[38] The second prong requires that the Applicants show they could not reasonably seek refuge in the IFA location when considering all the circumstances including those particular to them.

[39] To succeed in proving that a proposed IFA is not viable, an applicant must persuade the decision-maker, in this case the RAD, that at least one prong of the two-prong test is not made out*: Aigbe v Canada*, 2020 FC 895 at paragraph 9.

[40] An applicant must meet a very high threshold to prove the unreasonableness of an IFA. To do so requires actual and concrete evidence proving that there are conditions that would jeopardize the life and safety of a claimant in travelling or temporarily relocating to a safe area:

Ranganathan v Canada (Minister of Citizenship and Immigration), [2001] 2 FC 164 (FCA) at paragraph 15.

B. *Impact of the RPD Credibility Findings on the IFA Analysis*

[41] The Applicants complain that the RAD did not address any of the credibility issues they raised. Relying on *Giraldo Cortes v Canada (Citizenship and Immigration)*, 2011 FC 329 they say that an improper credibility finding will taint the entire decision as a result of which the 'alternative finding' made by the RPD cannot stand.

[42] I disagree for the following reasons.

[43] When the RAD upheld the RPD finding that there was a viable IFA city, it was agreeing with that specific determination. The RAD did not rely on the negative credibility findings made by the RPD nor did the RAD make any such findings. Instead, the RAD accepted the various statements by the PA as well as the affidavits from her uncle and mother regarding her personal experience with the agent of persecution. There were no negative credibility findings that could taint the entire decision or impact the IFA determinations.

[44] In submissions to the RAD, the Applicants argued that the RPD should have conducted a thorough analysis of the subjective fear of the Applicants. The RAD reasonably found that was not required as there was no objective basis to support the Applicants' subjective fear. It noted that the new affidavits spoke of the agent of persecution's possible motivation but, to that date, the persecutors had only harassed close family members.

[45] The RAD found that the presumption of truth in favour of the Applicants did not extend to their assertions that the persecutors were linked with a bigger network. That is a reasonable finding as the assertions were unsupported by any evidence and were essentially bald assertions.

[46] Considering the record and the submissions made to the RAD and to the RPD, I am not persuaded that the RAD's finding that the IFA city was viable for the Applicants has been shown to be unreasonable.

VIII. **Revocation of the Jurisprudential Guide for Nigeria does not affect the RAD decision**

A. *The Notice of Revocation*

[47] As of April 6, 2020, Jurisprudential Guide TB7-19851 (JG) for Nigeria was revoked because developments in Nigeria, including those in relation to the ability of single women to relocate to the various internal flight alternatives proposed in the JG, had diminished the value of the decision as a jurisprudential guide.

[48] The Notice of Revocation stated that the framework of analysis of the revoked guide will be identified now as a RAD Reasons of Interest decision. The Notice also stated that members of the RAD are able to use the analytical framework of the revoked guide in assessing the facts of each case as well as the most current country of origin information. The analytical framework includes the legal test for identifying a viable IFA as well as seven factors to be considered.

[49] As this issue was identified the day before the hearing of this application, following a brief discussion with counsel during the hearing, I provided them the opportunity to file post-hearing written submissions.

B. *Analysis of the Arguments of the Parties*

[50] The Applicants relied on *Liu v Canada (Citizenship and Immigration)*, 2020 FC 576 [*Liu*], in which Mr. Justice Norris found after an analysis of the reasoning and decision of the RPD that it had been unduly influenced by that JG. As the error went to the root of the decision it was a decisive issue that was sufficient enough to set aside the decision of the RPD. In fact, Justice Norris noted that in several instances the RPD findings were almost identical to the wording set out in the China JG.

[51] I accept the Applicants' statement that although the RAD decision was made before the revocation of the JG, *Liu* stands for the proposition that I have jurisdiction to consider whether the decision by the RAD was unduly influenced by the JG.

[52] Although the Applicants have urged me to conduct a correctness review in that respect they have misread *Liu*. Justice Norris reviewed the matter of the appropriate standard of review and concluded that it did not matter whether it was a correctness or reasonableness review since the result will be the same under either standard. This was because improper influence was either a fettering of discretion or an interference with a quasi-judicial decision maker's independence to make findings of fact, both of which are unreasonable.

[53] The Respondent distinguishes *Liu* on the basis that the Chinese JG was revoked due to an error it contained regarding the use of facial recognition technology at Beijing airport. The Chinese JG said that facial recognition technology was in place and it was implausible that applicants could have left China using their own passports if they were wanted by the authorities. However, the Response to Information Request relied on in the Chinese JG said that technology was no longer in use when those applicants left China. The Chinese JG was revoked due to that error, coupled with a number of updates to the China documentation package which had diminished the value of the guide going forward.

[54] I agree with the Respondent. The Chinese JG contained a fundamental factual error the severity of which cast doubt on the entire JG.

[55] The Applicants point out that the RPD and the RAD each referred to the JG and argue that they were unduly influenced by it. They say that the RAD's use of the JG as a guide for its analysis and consideration of all the factors listed in the JG shows that the JG tainted the entire decision of the RAD and it must be set aside.

[56] In *Canadian Association of Refugee Lawyers v Canada (Citizenship and Immigration)*, 2019 FC 1126 the Chief Justice noted that the Nigeria JG "repeatedly refers to the need for each case to be adjudicated on the basis of its particular facts". On that basis, the Chief Justice noted that:

> [119] Considering the passages that I have underlined in the various quotes above, I am satisfied that the Nigeria JG does not unlawfully fetter the discretion of Board members or improperly constrain their freedom to decide cases that may come before them

> according to their own conscience. On the contrary, the JG makes it abundantly clear that each case must be decided on its particular facts. To the extent that Board members are expected to do anything in particular, it is simply to apply the established test for an IFA, to take account of the jurisprudence and the country documentation that is mentioned in the JG, and then to reach their own decisions based on the particular facts of the case.
>
> (Underlining in the original)

[57] In this case the RAD observed that while the JG was not binding, it addressed factors that were often considered in reviewing the reasonableness of an IFA. In addition, the RAD noted the Applicants had raised three other issues for consideration: gender, their financial situation and the lack of a support network. Gender was not reviewed as it had been considered by the RAD in assessing the risk of persecution.

[58] The RAD reviewed each of the seven factors set out in the JG and the two additional factors put forward by the Applicants. It made independent assessments of each factor based on the specific circumstances of the Applicants. After reviewing transportation and travel, language, education and employment, accommodation and religion, the RAD found that none of them supported a finding of unreasonableness for the IFA city.

[59] The RAD noted that the Applicants could fly directly to the IFA city, they spoke English, the official language of Nigeria, the PA was well-educated and had number of years of experience in the workforce, being Christian was not an issue as half the population in the IFA city was Christian, and while accommodation is often very difficult for female-headed households without male support the PA had three brothers still Nigeria who might be able to provide some assistance in obtaining housing.

[60] With respect to indigeneship, the Applicants argued that the Nigerian government would persecute them and that although they speak English, it is not used in trade and business. The RAD found that there was some support that indigeneship would limit the Applicants' access to government jobs and programs and political positions but that while discriminatory it did not rise to the level of persecution. The RAD also found that indigeneship status was less important in big cities and that non-indigenes could generally find work in the private sector.

[61] When the RAD considered medical and mental health care, it noted that the Applicants had not made any specific arguments in that regard but the objective evidence is that in general medical and healthcare facilities are concentrated in large cities such as the IFA city.

[62] The RAD also addressed the financial impact on the Applicants of living in the IFA city where the costs of living were relatively high. The RAD took into account the PA's education and work experience and found that she would have the opportunity to obtain well-paying employment which would offset the high costs.

[63] Finally, the RAD looked at the lack of a support network in the IFA city but found that with the three siblings of the PA being in Nigeria, noting that they are supportive of the Applicants, coupled with the wide availability of cell phones in Nigeria, it mitigated against a finding that the IFA city was unreasonable.

[64] The Applicants separately submitted in this application that the JG was revoked because conditions in Nigeria had changed substantially since the JG was enacted so it was no longer fair

and appropriate to apply the JG to claimants from Nigeria, particularly women seeking safety in other parts of Nigeria. However, no evidence was presented as to the nature of the changes or how the changes might affect the Applicants personally with respect to the reasonableness of the IFA city.

[65] On reviewing the jurisprudential guide and considering the arguments made by the parties I find, as did Mr. Justice Zinn in *Ossai v Canada (Citizenship and Immigration),* 2020 FC 435 at paragraph 26 that the RAD's consideration of the evidence on the second prong of the IFA test was not a "perfunctory recitation" of the factors in the Nigeria JG followed by a summary conclusion; rather, it was a sufficiently detailed application of the applicants' circumstances to a "comprehensive set of forward-looking criteria".

[66] Given the foregoing, I conclude that the revocation of the JG did not affect the reasonableness of the RAD's decision.

IX. **Conclusion**

[67] The Applicants were not able to provide actual and concrete evidence proving that there are conditions in the remaining IFA city that would jeopardize their lives and safety either in travelling or temporarily relocating to it.

[68] The Supreme Court has re-confirmed in *Vavilov* that "[i]t is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings". The reviewing court must refrain

from “reweighing and reassessing the evidence considered by the decision maker”: *Vavilov* at paragraph 125.

[69] There were no such exceptional circumstances in this matter.

[70] The RAD reasonably conducted an independent review of the record, considered Chairperson’s Guidelines 4, reasonably applied the now revoked JG to the specific factual circumstances of the Applicants and provided it’s own extensive reasons for finding the IFA city was viable.

[71] There is an internally coherent and rational chain of analysis by the RAD that is justified in relation to the facts and law. As such, the application of reasonableness review requires the reviewing Court to defer to the decision under review: *Vavilov* at para 85.

[72] Although the RAD overlooked an affidavit which affected the viability of one of the IFA cities it considered, that affidavit did not affect the analysis of the other city nor did the Applicants allege that it did. I am satisfied that the oversight was not so sufficiently central or significant as to render the decision unreasonable: *Vavilov*, at para 100.

[73] I am satisfied, for all the foregoing reasons, that the RAD decision is reasonable.

[74] Neither party proposed a question for certification nor does one arise on these facts.

X. **Anonymization**

[75] This application has been dismissed because there was no evidence that the Applicants could be found in the IFA city. While the RPD found the Applicants were not credible, the RAD made no negative credibility findings and proceeded to accept the statements made by the Applicants. Without opining on the credibility of the allegations of persecution or risk, the RAD found that the existence of the IFA city was determinative.

[76] Having considered the matter, including the nature of the possible harm to the female minor Applicant, I am satisfied that should circumstances in Nigeria change to the extent that somehow the agents of persecution might find the Applicants in the IFA city, there would be a serious risk that the minor female Applicant could suffer serious harm if the names of all the Applicants and the locations of the IFA city is made known. I find such harm outweighs the public interest in open and accessible Court proceedings.

[77] Accordingly, the names of the Applicants will be removed from the style of cause and random initials A.B., C.D., E.F. and G.H. will be substituted therefore. In addition, the IFA city will not be named.

[78] The Registry will therefore be directed to amend the entry in the Court proceedings management system to delete the names of the Applicants and substitute “A.B.”, “C.D.”, “E.F.” and “G.H.” as Applicants.

JUDGMENT in IMM-4876-19

THIS COURT'S JUDGMENT is that:

1. The style of cause is anonymized to replace the names of the Applicants with the letters A.B., C.D., E.F., and G.H.
2. The Registry is directed to amend the entry in the Court proceedings management system to substitute the aforesaid letters for the names of the Applicants.
3. This application is dismissed.
4. No costs are awarded.
5. There is no serious question of general importance for certification.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4876-19
STYLE OF CAUSE:	A.B., C.D. (MINOR), E.F. (MINOR), G.H. (MINOR) v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY WAY OF VIDEOCONFERENCE BETWEEN OTTAWA AND TORONTO
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