

Federal Court



Cour fédérale

Date: 20210217

Docket: IMM-7623-19

Citation: 2021 FC 153

Ottawa, Ontario, February 17, 2021

PRESENT: The Associate Chief Justice Gagné

BETWEEN:

ELIZABETH ONOKHIFA OMORUAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. Elizabeth Onokhifa Omoruan is a citizen of Nigeria. The Refugee Protection Division [RPD] rejected her refugee claim based on the existence of a valid internal flight alternative [IFA] in Benin City, Nigeria. On appeal, the Refugee Appeal Division [RAD] concluded that the RPD erred in characterizing Benin City as an IFA, as it was the city where the Applicant lived for most of her life. It nevertheless rejected the appeal on the basis that the Applicant failed to adduce convincing evidence that there was a reasonable chance or serious possibility of persecution if she returned to Nigeria.

II. Facts

[2] The Applicant's allegations are set out in her Basis of Claim form. In short, she claims persecution by her immediate family who want her to undergo female genital mutilation [FGM]. She also fear members of Boko Haram, who abducted her in 2016 when she temporarily lived in Adamawa State with her husband.

[3] The Applicant was born and raised in Benin City, Nigeria. Her family wanted her to undergo FGM after she finished university. She refused and chose to marry her husband without her family's approval. The couple fled to Adamawa state where her husband was doing Christian pastoral work.

[4] In Adamawa state, the Applicant alleges she experienced persecution by Boko Haram.

[5] In September 2015, her husband was attacked by unknown assailants while he was evangelising. Shortly thereafter, the couple received threats from the same assailants, who they believed were from or associated with Boko Haram.

[6] In February 2016, the Applicant and her husband were at church doing educational outreach when their house was burned down. Masked members of Boko Haram later abducted the Applicant's husband; it was the last time the Applicant saw her husband.

[7] The Applicant was also abducted along with other men and women. One of the women was killed after an attempted sexual assault. Another was killed after an attempt at FGM. The Applicant managed to escape.

[8] The Applicant then tried to return to her family in Benin City but they labelled her as an outcast and threatened to kill her because of her refusal to undergo FGM. She went to live with her in-laws instead, also in Benin City, but she heard rumours that men were looking for her.

[9] In September 2016, she fled to the United States. She entered Canada on September 17, 2017 and submitted her refugee claim.

[10] The RPD heard her refugee claim and considered that the determinative issue was whether the Applicant had a valid IFA in Benin City. Although she was born and raised in Benin City, her alleged experiences of persecution by Boko Haram occurred in northern Nigeria. The RPD noted that the Applicant was able to resist forced FGM by her family and that her punishment for her decision was being ostracized – the evidence did not support that they would seek her out and force the procedure on her. In addition, the Applicant could not provide evidence that on a balance of probabilities there is a serious risk that Boko Haram would look for her in Benin City.

III. Impugned Decision

[11] The RAD agreed with the Applicant that it was an error for the RPD to consider Benin City as an IFA as it is where the Applicant spent most of her life. The RAD rather framed the

determinative issue as to whether the Applicant met the onus of establishing that there was a reasonable chance or serious possibility that she would be persecuted upon returning to Nigeria. However, the RAD found that the RPD's error was not fatal because when assessing the first prong of the IFA test, the RPD did, in fact, turn its mind to the real issue, as framed by the RAD.

[12] The RAD concluded there was no reasonable chance or serious possibility of persecution by the Applicant's family. In its view, the evidence did not support that the Applicant's father or family were trying to force her to undergo FGM. Considering that they sent her away and ostracized her upon her return to Benin City, the RAD found that there was insufficient evidence that her family would pursue her and harm her in Benin City.

[13] The RAD also concluded there was no reasonable chance or serious possibility of persecution by Boko Haram in Benin City because the documentary evidence supported that Boko Haram was primarily active in northern Nigeria. The documentary evidence did not support the fact that Boko Haram would have the interest or capacity to track someone outside of that region.

[14] Despite being sensitive to the Applicant's difficult circumstances, the RAD found the record did not establish, on a forward-looking basis, that she faces a reasonable chance or a serious possibility of persecution in Nigeria.

IV. Issues and Standard of Review

[15] The Applicant filed a first Memorandum of Argument at the leave stage, where she raised two issues: i) Whether the RAD breached the principles of natural justice and procedural fairness by failing to meet the Applicant's legitimate expectations that the *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution* [the Gender Guidelines] would be applied in a meaningful way; and ii) whether the RAD's decision that there was no reasonable chance, or serious possibility, that the Applicant would be persecuted if she returns to Nigeria was reasonable in light of the particular circumstances of the case.

[16] The Applicant filed a Further Memorandum of Argument, which did not purport to replace the first one, but rather to add to it. She raised two additional issues: iii) whether the RAD erred in law in its application of the legal test for persecution as set out in the jurisprudence; and iv) whether the RAD erred in law by indirectly basing its decision refusing the Applicant's claim to protection in Canada on the fact that according to the RAD, the Applicant has a viable IFA in Benin City, while erroneously failing to conduct the required analysis.

[17] As per the Order of Justice Russell Zinn granting leave, the Applicant's Further Memorandum of Argument ought to have replaced her original Memorandum and should be the only one considered by the Court. Nevertheless, I will rephrase the issues as follows:

- A. *Did the RAD meaningfully apply the Gender Guidelines?*
- B. *Was the RAD required to conduct an IFA analysis?*

A. *Did the RAD err in finding that the Applicant did not meet her burden to prove there was a reasonable chance, or serious possibility, that she would be persecuted if she returns to Nigeria?*

[18] These issues are all reviewable under the standard of reasonableness, including whether the RAD meaningfully applied the Gender Guidelines (*Odia v Canada (Citizenship and Immigration)*, 2014 FC 663 at para 18 [*Odia*]). Contrary to the Applicant's view, she has not provided any reason to rebut presumption that the reasonableness standard applies (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 17 [*Vavilov*]).

V. Analysis

A. *Did the RAD meaningfully apply the Gender Guidelines?*

[19] The Applicant submits she had a legitimate expectation that the Gender Guidelines would be considered by the RAD in a meaningful way while being alert and sensitive to the fact that she endured significant gendered persecution. It was not sufficient for the RAD to say that it had considered and applied the Gender Guidelines while failing to demonstrate that it did (*Odia* at para 18).

[20] The Applicant submits that the RAD did not take issue with her credibility. She provided evidence that her family threatened to kill her, and therefore her punishment for refusing to undergo FGM was not simply being ostracized. Moreover, documentary evidence supports that other consequences may include blackmailing, stigma, denial of intercultural benefits, and physical abuse. Further still, being ostracized can have a damaging effect on mental health. The UNHCR Guidance Note on Refugee Claims relating to FGM [UNHCR Guidelines] states that relocation is not normally reasonable for women who would then be without family support.

[21] I agree with the Applicant that the RAD must do more than simply say the Gender Guidelines were applied without demonstrating how. However, the Applicant has not actually made a concrete argument as to how the RAD erred in its application of the Gender Guidelines.

[22] Although the Applicant argues that the RAD overlooked or erroneously considered evidence, such that the Applicant is without family support, the RAD's decision does not support this conclusion. The RAD explicitly acknowledged the Applicant was ostracized and suffered the loss of her husband. The RAD also explicitly acknowledged that the Applicant's family threatened to kill her when she came back to Benin City. However, the RAD found that the fact they ostracized her and pushed her away was incompatible with her fear that they would pursue her; there was in fact insufficient evidence that she would be pursued.

[23] The Applicant cited the UNHCR Guidelines before the RAD in her appellant submissions. The RAD is presumed to have considered the evidence before it. While the Applicant may wish for the RAD to have placed greater emphasis on the UNHCR Guidelines, ultimately the RAD emphasized other evidence. The RAD cited the National Documentation Package, which shows that women who are more educated have a better chance of refusing FGM, but that a consequence may still be ostracism – the RAD noted this was consistent with the Applicant's situation, and that being ostracized did not rise to the level of persecution in the Applicant's situation. In my view, the Applicant's argument amounts to asking this Court to reweigh evidence, which is not its role.

[24] I note also that the RAD did not minimize the harms suffered by the Applicant, but rather explicitly acknowledged the Applicant's case contained difficult circumstances.

B. *Was the RAD required to conduct an IFA analysis?*

[25] According to the Applicant, the RAD faulted the RPD for having considered Benin City as an IFA, but it indirectly did the same thing. She argues the RAD further erred by omitting to address the second prong of the IFA test and assess whether the conditions of Benin City would make it unreasonable for the Applicant to seek refuge there (*Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (CA) and *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 (CA)).

[26] The parties both take the position that an IFA analysis is only needed when the decision maker accepts that a claimant is in danger in one part of the country. I do not need to take position on that issue but suffice it to say that the Court has recently expressed a different view in *Kazeem v Canada (Citizenship and Immigration)*, 2020 FC 185.

[27] That said, the RAD did not engage in an IFA analysis. The only issue the RAD was concerned with was whether the Applicant is a Convention refugee or a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[28] The question is therefore whether there is a reasonable chance that persecution would take place where the Applicant would be returned to her country of origin.

[29] The Applicant argues that this was not the test applied by the RAD. I do not agree. The RAD explicitly states this test throughout the decision: at paras 12, 14, after paragraph 15, 18, 25, 27, 28 and 29.

[30] Despite writing the correct test, the Applicant argues that the RAD erred by applying the wrong test when the RAD wrote that the Applicant failed to provide sufficient and trustworthy evidence that her family would pursue her and try to kill her (emphasis added).

[31] I agree a decision maker can err by requiring an applicant to establish that she would be persecuted (see for example *Lawal v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 301 at para 10). However, that it is not what the RAD did in this matter. The RAD said that there was insufficient evidence that persecution would occur. The RAD was then making reference to standard of proof – the balance of probability – and focusing too heavily on the word “would” detracts from the real meaning of the RAD’s decision. The real meaning of the RAD’s decision, as I understand it, is that the Applicant did not convey sufficient information, on a balance of probabilities, to show that there was a serious possibility she would face the persecution she alleged in Nigeria.

[32] Considering the RAD repeatedly stated the proper test – and applied it – I would add that judicial review is not a line-by-line treasure hunt for error (*Vavilov* at para 102). The Applicant’s focus on a single sentence of the decision is insufficient to detract from its essence.

C. *Is the RAD's decision reasonable?*

[33] The Applicant attacks the reasonableness of the RAD's decision on the basis that:

- Her credibility was not refuted;
- She provided uncontradicted evidence of past persecution by Boko Haram and her family, and she is a single woman with no family or marital support;
- The RAD's decision is unintelligible; it is not clear whether the RAD rejected the Applicant's claim because she can safely reside in Benin City, or because she can safely reside anywhere in Nigeria;
- Benin City is where her family threatened her and therefore it is unreasonable to conclude that she has no reasonable chance of being persecuted there;
- Ostracism can also have a damaging impact on the Applicant's mental health;
- Refusing to undergo FGM may lead to physical abuse according to the documentary evidence.

[34] Whether the RAD made a credibility finding about the Applicant does not affect the reasonableness of its decision. Nor do her experiences of past persecution render the RAD's analysis of forward-looking risk unreasonable.

[35] The RAD's decision related to Boko Haram is intelligible – the RAD's point was clearly that Boko Haram lacks interest and capacity to track down targets outside of its area of control.

[36] Although the Applicant provided uncontradicted evidence of past persecution, the Applicant was still required to make her case that, on a balance of probabilities, she would face a reasonable chance of persecution in Nigeria. That the RAD concluded she would not face such a

chance is not reviewable unless the Applicant can point to an error in the RAD's reasoning. The mere existence of past persecution is not sufficient. Neither is the fact she will be ostracized by her family. The RAD addressed this, noting that it did not rise to the level of persecution.

[37] The RAD is entitled to deference for its decision to weigh the evidence as it did and, again, it is not the role of the reviewing court to reweigh evidence.

VI. Conclusion

[38] For all these reasons, the Applicant's application for judicial review is dismissed. The parties have proposed no question of general importance for certification and none arises from the facts of this case.

JUDGMENT in IMM-7623-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed;
2. No question of general importance is certified;
3. No costs are granted.

“Jocelyne Gagné”

Associate Chief Justice

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-7623-19

STYLE OF CAUSE: ELIZABETH ONOKHIFA OMORUAN v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

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