Federal Court  Cour fédérale

Date: 20210308

Docket: IMM-4551-19

Citation: 2021 FC 210

Ottawa, Ontario, March 8, 2021

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

ETHELBERT CHUKWUNYERE

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ethelbert Chukwunyere, is a citizen of Nigeria. He alleges he became a coordinating member of the Indigenous People of Biafra [IPOB] in 2016, having joined the group in 2015 at the urging of his father. At an IPOB rally raided by police in 2015, he sustained injuries for which he sought treatment at a hospital. Nigerian security forces killed his father in March 2017 as part of a crackdown, allegedly when they sought Mr. Chukwunyere while he was

visiting his parents in their family home. He escaped out the back after his father tipped him off before being killed. At the urging of his mother who feared for his life, Mr. Chukwunyere obtained a US visa. Several months later, he travelled to the US where he spent about seven months before crossing the border into Canada and seeking refugee protection. His wife and children remained in Nigeria. Mr. Chukwunyere fears state persecution because of his nationality and political opinion.

[2] The Refugee Protection Division [RPD] dismissed Mr. Chukwunyere's application for refugee protection pursuant to sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. See Annex "A" below for these provisions. Mr. Chukwunyere appealed the RPD's decision to the Refugee Appeal Division [RAD]. Following an independent assessment of the evidence and arguments, including the transcript of the RPD hearing, the RAD dismissed the appeal and confirmed the RPD's decision. Mr. Chukwunyere now seeks judicial review of the RAD's decision.

[3] The main issue for consideration is whether the RAD's decision was unreasonable in three respects. Did the RAD: (i) unfairly and unreasonably make new credibility findings; (ii) err in its section 96 analysis; and (iii) fail to conduct a separate section 97 analysis? In my view, this three-part question must be answered in the negative. I therefore dismiss this judicial review application, for the more detailed reasons that follow.

II. Standard of Review

[4] The presumptive standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 10. It is not a "rubber-stamping" exercise, but rather a robust form of review: *Vavilov*, above at para 13. A reasonable decision must be "based on an internally coherent and rational chain of analysis" and it must be justified in relation to the factual and legal constraints applicable in the circumstances: *Vavilov*, at para 85. Courts should intervene only where necessary.

[5] To avoid judicial intervention, the decision also must bear the hallmarks of reasonableness – justification, transparency and intelligibility: *Vavilov*, at para 99. The Court must avoid reassessing and reweighing the evidence before the decision maker; a decision may be unreasonable, however, if the decision maker "fundamentally misapprehended or failed to account for the evidence before it": *Vavilov*, above at paras 125-126. The party challenging the decision has the onus of demonstrating that the decision is unreasonable: *Vavilov*, at para 100.

[6] Breaches of procedural fairness in administrative contexts have been considered reviewable on a correctness standard or subject to a "reviewing exercise … 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied": *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54. The duty of procedural fairness "is 'eminently variable', inherently flexible and context-specific"; it must be determined with reference to all the circumstances, including the *Baker* factors: *Vavilov*, above at para 77. In sum, the focus of the reviewing court is whether the process was fair.

III. Analysis

[7] In light of Mr. Chukwunyere's written and oral submissions, it bears underscoring that the RAD's mandate is to review the RPD's decision through the correctness lens: *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [*Huruglica*] at para 78. This necessitates an independent assessment of the evidence and arguments following which the RAD can confirm the decision or set the decision aside and substitute its own determinations regarding the claim. Further, it is open to the RAD to make determinations on the same, additional or other evidence in the file: *Oluwaseyi Adeoye v Canada (Citizenship and Immigration)*, 2018 FC 246 [*Oluwaseyi Adeoye*] at para 15. *Huruglica* does not support a contrary suggestion.

(i) *Credibility*

[8] Mr. Chukwunyere's evidence included the affidavit of a friend. Contrary to Mr. Chukwunyere's argument, I find the RAD's treatment of this affidavit was neither unfair nor unreasonable. Unlike the RPD, the RAD did not find material difference in the terminology used by the deponent compared with Mr. Chukwunyere's description of the level of violence he faced at the protest in 2015 ("security forces lynched him with all their available gadgets" versus "the back of the baton, they used it, hitting me at the waist"). The RAD took issue, however, with the fact that Mr. Chukwunyere was in Canada already when the deponent stated he called Mr. Chukwunyere and urged him to leave Nigeria. In the RAD's view, this error called into question the credibility and reliability of the affidavit.

[9] I agree with the Respondent that it was open to the RAD, as part of its independent assessment of the evidence, to find an additional or an alternative basis within the affidavit on which to doubt Mr. Chukwunyere's credibility. Mr. Chukwunyere was already on notice that his credibility was in issue based on the RPD's decision: *Oluwaseyi Adeoye*, above at para 13. I disagree with the Applicant that the RAD raised a new issue without giving Mr. Chukwunyere an opportunity to respond: *Sary v Canada (Citizenship and Immigration)*, 2016 FC 178 at paras 28-31.

(ii) *Section 96 Analysis*

[10] Mr. Chukwunyere's evidence also included a letter from IPOB dated October 2, 2018, one day after the RPD hearing. I similarly find the RAD's treatment of this letter was not unreasonable. The letter confirmed: Mr. Chukwunyere's membership in IPOB; that he suffered injuries at the 2015 rally where some members were killed; that his father was shot dead in a crackdown by Nigerian soldiers in 2017; and that Nigerian soldiers are still killing their members. The letter was submitted one week after the RPD hearing where the lack of documentation from IPOB was in issue. Mr. Chukwunyere provided no explanation of how he was able to obtain the letter on short or no notice when his earlier testimony was that the people he normally would contact in this regard were running for safety and trying to hide from authorities.

[11] Further, while the letter confirms Mr. Chukwunyere was a coordinator, it is silent about the position's functions and duties. More significantly, the letter is silent about whether the authorities were seeking Mr. Chukwunyere at the time his father was killed. The affidavit of Mr.

Chukwunyere's wife also was silent about this significant issue. The RAD was of the view that the omission of this important event by people providing evidence of Mr. Chukwunyere's persecution weighed against the credibility of the account of authorities searching for him in 2017. In my view, this chain of analysis is internally coherent and rational.

[12] While the RAD found it more likely than not that Mr. Chukwunyere and his father were members of IPOB, the RAD concluded that Mr. Chukwunyere, more likely than not, exaggerated the level of threat he faced in Nigeria as a result of the following:

- Although Mr. Chukwunyere participated in a peaceful protest at which there was violence and he suffered some injuries, he lived and worked safely in another part of Nigeria for years, including for about two years after this incident until he left the country in 2017;
- The extent and nature of Mr. Chukwunyere's injuries were not recorded in the medial report; further, he was treated as an outpatient with anti-inflammatories, analgesic and antibiotic agents;
- Mr. Chukwunyere's duties and activities as a coordinator were vague and uneven; further, he did not provide any confirmation he was elected coordinator at the time of the election;
- There is insufficient evidence that the authorities were seeking Mr. Chukwunyere during the crackdown in 2017 or that his activities resulted in his father's death;
- The psychotherapist's report referred to the authorities looking for Mr. Chukwunyere in 2017; the psychotherapist, however, relayed what Mr. Chukwunyere told to her ("Mr. Chukwunyere's **reported** experience" as stated in the report [emphasis added]);
- The affidavit of Mr. Chukwunyere's wife described that she saw "strange people" around her compound in 2017 that she suspected were soldiers, with no explanation for her suspicion or that they were seeking her husband; the affidavit further described her

neighbour's impression of "strange people […] looking for her husband", but the RAD found this speculative because Mr. Chukwunyere had been gone for more than a year by then;

- The likelihood of persecution as a result of violence that occurred four years ago in a place where Mr. Chukwunyere did not live was too remote to demonstrate a forward-looking serious possibility of persecution, even in the context of Mr. Chukwunyere's position as an IPOB coordinator.

[13] Based on the above, the RAD dismissed the appeal and confirmed the decision of the RPD. While I agree with Mr. Chukwunyere on several points discussed below, I am not persuaded that the RAD's conclusions overall were unreasonable. For example, I agree with Mr. Chukwunyere that the RAD focused unduly on the functions and duties of a coordinator, thus placing form over substance. Regarding the objective documentary evidence, I further agree with Mr. Chukwunyere that personal targeting or past persecution is not required in order to establish a future risk for the purposes of section 96: *Olah v Canada (Citizenship and Immigration)*, 2017 FC 921 at para 14.

[14] The onus, however, is on Mr. Chukwunyere to establish that a link exists between the general documentary evidence and his specific circumstances: *Balogh v Canada (Citizenship and Immigration)*, 2016 FC 426 [*Balogh*] at para 19, citing *Prophète v Canada (Citizenship & Immigration)*, 2008 FC 331 at para 17; *Jarada v Canada (Minister of Citizenship and Immigration)*, 2005 FC 409 at para 28. The fact that documentary evidence shows the human rights situation in a country is problematic does not mean necessarily there is a risk to a given individual: *Ahmad v MCI*, 2004 FC 808 at para 22; *Rahim v MCI*, 2005 FC 18 [*Rahim*] at paras 19-20.

[15] Noting authorities have been aggressive towards IPOB members, particularly at rallies, the RAD concluded: “There is insufficient evidence of a forward-looking risk. The most generous reading of the evidence leads to the conclusion that he was involved, and he did not face persecution from 2015 onwards.” Although this could have been worded more clearly, I am not persuaded that the RAD impermissibly made past persecution a condition precedent to recognition as a refugee, as argued by Mr. Chukwunyere, and hence erred. More specifically, looking at the evidence and the RAD’s decision holistically, I am not convinced that Mr. Chukwunyere has met his burden of linking the objective documentary evidence (suggesting that IPOB members were detained and “constantly persecuted”) with his specific circumstances (complaints of some injuries at the 2015 rally for which he later was treated at the hospital as an outpatient). The RAD simply was not persuaded that there was sufficient evidence of “a significant contribution to the IPOB to conclude that the Applicant’s activities would lead to a profile with the authorities,” even taking into account the title of a coordinator.

[16] I find that Mr. Chukwunyere’s submissions on the whole involve a request to reweigh and reassess the evidence because of disagreement with the weight attributed and inferences drawn by the RAD. The Supreme Court has cautioned reviewing courts against doing so: *Vavilov*, above at para 125. Further, a conclusion is not unreasonable merely because inferences different from those of the decision maker reasonably could be drawn from the evidence. When considered cumulatively or in its totality, I find the evidence in the matter before me was sufficient such that the RAD’s decision could not be characterized as unreasonable: *Canada (Minister of Citizenship and Immigration) v Thanaratnam*, 2005 FCA 122 at para 34.

(iii) *Separate Section 97 Analysis*

[17] I also am not persuaded that the RAD erred in this respect. Whether a section 97 analysis is required depends on the circumstances of the particular case: *Brovina v Canada (Minister of Citizenship and Immigration)*, 2004 FC 635 [*Brovina*] at para 17. There is no obligation for the RAD to conduct a further section 97 analysis where the allegations in support of the section 97 claim were the same as those under section 96: *Kaur v Canada (Citizenship and Immigration)*, 2012 FC 1379 at paras 50-51; *Brovina*, above at para 18.

[18] Drawing from *Canada (Citizenship and Immigration) v Sellan*, 2008 FCA 381 at paras 2-3, the Court previously has held that "the RAD and the RPD are not obligated to undertake a section 97 analysis when faced with a case where the claimant lacks credibility": *Chinwuba v Canada (Citizenship and Immigration)*, 2019 FC 312 at para 31; *Huseynov v Canada (Citizenship and Immigration)*, 2019 FC 1392 at para 19; *Ikeme v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 21 at paras 40-42; and *Alkurd v Canada (Citizenship and Immigration)*, 2019 FC 298 at para 27. I see no reason to depart from this line of cases in the circumstances of the matter before me.

IV. Conclusion

[19] For all the foregoing reasons, I therefore dismiss this judicial review application.

[20] Neither party proposed a serious question of general importance for certification and I find that none arises.

JUDGMENT in IMM-4551-19

THIS COURT'S JUDGMENT is that: the judicial review application is dismissed; and there is no question for certification.

"Janet M. Fuhrer"
Judge

Appendix A: Relevant Provisions

Immigration and Refugee Protection Act, SC 2001, c 27

Convention refugee	**Définition de réfugié**
96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	**a)** soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	**b)** soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
Person in need of protection	**Personne à protéger**
97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	**97 (1)** A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	**a)** soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	**b)** soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	**(i)** elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not	**(ii)** elle y est exposée en tout lieu de ce pays alors que d'autres personnes

faced generally by other individuals in or from that country,	originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	**(iii)** la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	**(iv)** la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
Person in need of protection	**Personne à protéger**
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	**(2)** A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

FEDERAL COURT

SOLICITORS OF RECORD

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