

Federal Court



Cour fédérale

Date: 20210520

Docket: IMM-4732-19

Citation: 2021 FC 480

Ottawa, Ontario, May 20, 2021

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

**ONYEKA MARY ANONYAI
JESSE EBUBECHUKWU ANONYAI
JEREMY CHINEME ANONYAI
JEFFREY CHIDUBEM ANONYAI**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada [the RPD], dated July 9, 2019 [the Decision], which determined that the Applicants are not Convention Refugees or persons in need of

protection under ss 96 or 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] As explained in more detail below, this application is allowed, principally because a lack of intelligibility in the RPD's use of the country condition evidence [CCE] and the manner in which that evidence appears to have been used in the RPD's subjective fear analysis render the Decision unreasonable. The RPD also erred in its analysis of the nexus of the Applicants' claim to the Convention grounds and in its internal flight alternative [IFA] analysis.

II. **Background**

[3] The Applicants are a mother [the Principal Applicant] and her three minor sons. They are all citizens of Nigeria, and one of the sons is also an American citizen. The Principal Applicant alleges that the family fled Nigeria out of fear of persecution by members of the Yoruba people, members of the Ikorodu community, and the Nigerian police, due to her husband's sexual orientation as a bisexual man.

[4] The Principal Applicant and her husband were married in 2004. She alleges that, in December 2016, one of her husband's friends, the friend's parents, and the police came to their home. The parents accused the Principal Applicant's husband of having a same-sex relationship with the friend, and the police told the Principal Applicant that her husband was to report to the police. She alleges that the next day her husband went to work and never came home. In July 2017, he called her from Canada and told her he was safe. He claimed refugee protection in

Canada based on his sexual orientation as a bisexual. He was determined to be a Convention refugee by the Refugee Appeal Division in August 2018.

[5] The Principal Applicant states that after her husband's departure in December 2016, she moved to her mother's house, she did not go out, and her children did not attend school. She alleges that, while she was living there, her neighbour observed people coming to her home. She returned to her home in July 2017, after she heard from her husband in Canada. The Principal Applicant alleges that, in November 2017, Yoruba people came to her house yelling and asking where her husband was. She also alleges that, on December 1, 2017, as she was arriving home in her car, a group of men outside her house attacked her. She alleges that the police brought her to the hospital. When she left the hospital, she went to stay with a friend.

[6] The Applicants obtained visas to the United States [US] and left for the US on December 25, 2017. From there, they made their way to Canada on January 3, 2018, and filed their refugee claims.

III. **Refugee Protection Division Decision**

[7] The RPD determined that the Applicants are not Convention refugees or persons in need of protection. It identified the determinative issues to be nexus to Convention grounds, credibility, subjective fear, IFA, and agents of persecution. The following summary employs the principal headings and sub-headings in the Decision.

A. *Nexus to Convention Grounds*

[8] The RPD explained that a Convention refugee must fear persecution by reason of one of the grounds enumerated in s 96 of IRPA, which are race, religion, nationality, membership in a particular social group, and political opinion. The Applicants claimed that they have a nexus to a Convention ground because the Principal Applicant's husband is a member of a particular social group as a bisexual man, and they are part of the same social group as his family.

[9] The RPD referred to jurisprudence identifying three possible categories of particular social groups: (1) groups defined by an innate or unchangeable characteristic; (2) groups whose members voluntarily associate for a reason so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence. The RPD determined that being the family of a bisexual man does not fit any of these three tests for membership in a particular social group. Therefore, the RPD found that the Applicants did not have a nexus to a Convention ground.

B. *Credibility*

(1) Whereabouts of the principal claimant's in-laws

[10] The RPD then assessed the Principal Applicant's credibility. It began by noting that her testimony about her husband's family was inconsistent with the basis of claim form [BOC] that her husband submitted with his refugee claim. For instance, the Principal Applicant testified that her mother in-law lives in Delta and her father in-law had passed away, while her husband's

BOC states that his parents both live in Lagos. The RPD also noted that the narrative in the Principal Applicant's refugee claim mentions that her husband has a sister, but this sister is not mentioned in her husband's BOC. Based on these inconsistencies, the RPD found that the claimant's husband misrepresented and omitted pertinent information and thus drew a negative credibility inference.

(2) Incident of December 2016

[11] The RPD next turned to the alleged incident in December 2016. The Principal Applicant alleged that the police came to her home with her husband's partner's parents, but the RPD noted that the police did not issue an arrest warrant for her husband. The RPD reviewed evidence in a Response to Information Request [RIR] regarding how bisexuality is perceived in Nigeria. It identified passages in the RIR indicating that people who are "outed" for engaging in same-sex behavior will be seriously ostracized by their family, harshly excommunicated and threatened, and sometimes beaten by their family members. However, the RPD found no mention of family members of persons in same-sex relationships being targeted. The RPD also noted that country condition documents submitted by the Applicants did not mention family members being targeted. Additionally, the RPD found that the Applicants living in their own home and the children going to school from July 2017 to December 2017 was behaviour inconsistent with a subjective fear of the police and the community.

(3) Medical document

[12] The Panel next assessed a medical report, dated December 11, 2017, resulting from the incident in which the Principal Applicant alleged she was beaten when arriving home. The RPD explained that the Principal Applicant had initially responded to the RPD's questions about her injuries by testifying that she had been beaten, her injuries were physical, and she had become unconscious. She stated that there was discolouration of her skin and testified that she was given painkillers and tablets as treatment. However, the RPD pointed out to the Principal Applicant at the hearing that the medical report says "[a] critical diagnosis of physical trauma was made" but then that "[m]edical examination were not carried out as patient hurried out of emergency unit". Noting that the Principal Applicant testified that she only received emotional treatment, the RPD found inconsistency between her testimony and the medical report and drew an adverse inference on that basis.

(4) Business in Nigeria

[13] The RPD then turned to the allegation that the Principal Applicant and her husband had a business in Nigeria. It drew an adverse inference from the lack of documentation regarding the business as well as inconsistencies between the Principal Applicant's testimony and the documents in her claim. Specifically, the RPD noted that the Principal Applicant testified that she worked for the business from home and did accounting, while her narrative suggests that she was a stay-at-home mother. Additionally, the RPD noted that the Principal Applicant testified that she auctioned off the goods from the business in December 2017 with the help of a sales

worker, but the worker's affidavit does not mention arranging an auction of the goods or that the claimant was an accountant for the company.

(5) Affidavits

[14] The RPD then compared evidence in the Principal Applicant's narrative to an affidavit from the sales worker. The RPD found that these two statements were inconsistent in describing the damage to the Principal Applicant's house after the December 1, 2017 attack, which detracted further from her credibility.

(6) Fear of police

[15] The RPD also had concerns with the Principal Applicant's alleged fear of the police. She testified that she had never been harassed by police. The RPD was also not satisfied with the Applicant's evidence that she had not reported the December 1, 2017 attack to the police because she was scared. She alleged that the police brought her to the hospital, and the RPD reasoned that it could be assumed this would result in a police report if they were on the scene. Additionally, the RPD found that the fact that the Applicants had no problem leaving Nigeria on their own passports with valid visas, even though they alleged the police were looking for her, showed a lack of subjective fear.

(7) Current situation

[16] Finally, still under its Credibility heading, the RPD referred to the Applicants' current situation in Canada, noting that the Principal Applicant, her husband and their children live

together, and that they have had another child here in Canada. The RPD also noted that the Principal Applicant testified that her husband will be sponsoring her and their children now that he has been determined to be a Convention refugee. The RPD did not make any express comment on how these details affected its assessment of the Principal Applicant's credibility.

C. *Well-Founded Fear of Persecution - Objective Basis*

[17] The RPD next returned to the CCE relevant to the Applicants' claimed fear of persecution. The RPD noted that the RIR indicates that bisexual people in Nigeria are commonly targeted or blackmailed and extorted by police and that same-sex activities are criminalized in Nigeria.

[18] However, the RPD commented that the Applicants are only associated with a person who is allegedly bisexual, by being members of his family. Due to its credibility concerns, the lack of documentary evidence, the absence of arrest warrants from the police due to the husband's sexuality, and the Applicants' ability to leave Nigeria with a valid visa to the US, the RPD found a lack of subjective fear.

D. *Internal Flight Alternative (IFA)*

[19] The RPD next assessed whether the Applicants have a viable IFA in Abuja. The RPD set out the two-part test for assessing an IFA: (a) there must be no serious possibility of the claimant being persecuted, or subject to a risk to life, cruel and unusual treatment or punishment or danger, or torture in the IFA; and (b) the IFA must not be unreasonable in all the circumstances.

The RPD acknowledged that when the Principal Applicant was asked if she could go to Abuja, she testified that the police are everywhere and they are looking for her. However, she also testified that there were no arrest warrants for her and that she had no problem exiting Nigeria at the airport. The Principal Applicant also stated that she would be found out if she registered her children for school in Nigeria, but the RPD noted that, prior to July 2017, the Principal Applicant had moved to her mother's place in Lagos and attended school.

[20] The RPD concluded that the Principal Applicant was not credible, had not established a well-founded fear, and has an IFA in Abuja.

IV. **Issues and Standard of Review**

[21] The Applicants raise the following issues in this application for judicial review:

- A. Did the RPD make unreasonable findings when assessing the Applicants' credibility?
- B. Did the RPD breach procedural fairness by failing to put its credibility concerns to the Applicants?
- C. Was the RPD's analysis of the risk the Applicants faced, under ss 96 and 97 of IRPA, unreasonable?
- D. Did the RPD make further unreasonable findings regarding subjective fear and IFA?

[22] The parties agree, and I concur, that the reasonableness standard of review applies to the above issues, with the exception of the procedural fairness issue, to which the correctness standard of review applies.

V. **Analysis**

A. *General Comments on Standard of Review*

[23] As an initial comment, I note the Applicants' general submission that the Decision is in several respects unclear and unintelligible, as the RPD does not set out clear conclusions based on its findings but rather leaves the Applicants speculating as to when and why a negative assessment is made based on such findings. The Respondent acknowledges that the Decision is not well written but submits that, if read as a whole, it is defensible and should withstand judicial review under the reasonableness standard. In response to this argument, the Applicant relies on the instruction in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov], at para 96:

96. Where, even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision. Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome: *Delta Air Lines*, at paras. 26-28. To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion. This would also amount to adopting an approach to reasonableness review focused solely on the outcome

of a decision, to the exclusion of the rationale for that decision. To the extent that cases such as *Newfoundland Nurses* and *Alberta Teachers* have been taken as suggesting otherwise, such a view is mistaken.

[Emphasis added]

[24] I find no incompatibility between the principles advocated by the parties. As the Respondent submits, it is acceptable for a court reviewing an administrative decision, even a poorly written one, to consider the decision as a whole with a view to assessing whether the tribunal's reasoning can be derived therefrom and whether that reasoning itself withstands review on the standard of reasonableness. This is different from the Court impermissibly substituting reasons, which it might have given for the decision that are not apparent even from the sensitive and contextual review that *Vavilov* contemplates.

[25] The fact the Decision is poorly written is not in itself sufficient to make it unreasonable under the *Vavilov* framework. However, because of the challenges in interpreting the Decision, my Reasons are not structured around the framework of the list of issues articulated by the Applicants. Rather, I will explain my understanding of the RPD's reasoning and, in that context, will consider the parties' argument in assessing the reasonableness of that reasoning.

B. *Nexus to Convention Ground*

[26] In assessing the Decision, I have first considered the RPD's finding that the Applicants do not have a nexus to a Convention ground. The RPD reached this conclusion because the Principal Applicant does not claim to be bisexual. It notes that she alleges fear of persecution because she is married to a bisexual man. She asserts that, because her husband is a member of a

particular social group protected on a Convention ground, the Applicants' membership in his family make them members of the protected social group as well.

[27] The RPD provides very little analysis supporting its finding that the Applicant's family does not satisfy the test for identifying a particular protected social group. However, I interpret the RPD's reasoning to be that the Principal Applicant is not herself bisexual and that she and her children cannot qualify if they face persecution only because they are members of the same family as a bisexual person. I consider this reasoning to be contrary to applicable jurisprudence. For example, in *Macias v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1749, Justice Martineau explained that, in order to consider immediate family as a particular social group, the applicant must only prove that there is a clear nexus between the persecution that is being levelled against one member and that which is taking place against the applicant (at para 13).

[28] The Respondent does not dispute this jurisprudential principle. Rather, the Respondent argues that the RPD reached its conclusions on nexus based on its adverse credibility findings, i.e. because the RPD did not believe that the Applicants were actually being persecuted based on the husband's sexual orientation. It is difficult to read the nexus portion of the Decision in this manner, because the RPD concludes its nexus analysis by stating that, even if the claimant had a nexus to the Convention ground, it does not find her testimony to be credible and her evidence is not supported by the documentary evidence. This indicates that the RPD made its nexus finding for reasons unrelated to credibility. As explained above, this finding does not accord with the jurisprudence and is not reasonable. However, this is not alone a basis to allow this application

for judicial review, because the RPD also found the Principal Applicant not credible, including lacking subjective fear. Therefore, I will next consider that portion of the RPD's analysis.

C. *Credibility and Subjective Fear*

[29] The RPD made a number of adverse credibility findings, including related to what the Respondent acknowledges are minor points surrounding the members of the Principal Applicant's husband's family. However, the Respondent's Further Memorandum of Fact and Law submits that, notwithstanding various credibility findings which the Applicants now challenge, the critical issue in this case is whether the Applicants would face a serious possibility of persecution as family members of a bisexual man. The RPD noted the lack of any CCE of family members of bisexual men being targets of persecution in Nigeria. The Respondent describes this as the determinative credibility finding.

[30] I agree with the Respondent's interpretation of the Decision. The Respondent also notes that the Applicants have not challenged the RPD's assessment of the content of the CCE. Again, I agree with that submission. However, the Applicants do take issue with the RPD's reliance on the CCE for purposes of its adverse credibility assessment. The RPD's reliance on the CCE is found in the sections of the Decision bearing the headings "Incident of December 2016" and "Well-Founded Fear of Persecution – Objective Basis", which focus on the Applicants' credibility and subjective fear. I therefore turn to those sections of the Decision.

D. *Incident of December 2016*

[31] Under this heading, the RPD considers the incident of December 2016, in which the Principal Applicant alleges that the police came to her home with her husband's same-sex partner and his parents. Most of this section of the Decision is devoted to the RIR and other CCE, which the RPD states does not mention targeting of family members of persons in same-sex relationships in Nigeria.

[32] As the Applicants submits, this section of the Decision contains no clear analysis or conclusion explaining how the RPD is relying on the CCE. The Respondent submits that this section, which is under the overall "Credibility" heading, is to be read as indicating that the RPD did not believe that the December 2016 incident took place. This conclusion is far from clear, which itself raises concerns about the intelligibility of the Decision. However, it may be that the RPD's reasoning is that, in the absence of CCE corroborating that family members of persons in same-sex relationships are targeted, the Principal Applicant's evidence as to the December 2016 incident is not credible. If this is how the Decision is to be interpreted, there are a number of concerns with the reasoning.

[33] First, as the RPD described her evidence, the Principal Applicant alleged that, when the police and others came to her home in December 2016, her husband's partner's parents accused her husband of destroying their son's life, and the police informed the Principal Applicant that they were looking for her husband, who was to report to the police. The RPD does not explain how it could conclude that those events, which involved the police searching for the husband,

were not supported by the CCE. As identified in this section of the Decision and elsewhere, the CCE confirms that people who engage in same-sex sexual activity in Nigeria are subject to persecution by their family, the community, and the police.

[34] Second, the Applicants submit that it is an error to reject the credibility of claimants' personal evidence as to what happened to them, just because there is a lack of CCE corroborating their allegations. The Applicants refer the Court to *Bao v Canada (Citizenship and Immigration)*, 2015 FC 606 [*Bao*] at para 18, in which Justice Mosley held that, while the RPD is permitted to find that objective evidence contradicts a claimant's story, it is not entitled to reject testimony solely because it is not corroborated by documentary evidence from a particular source.

[35] I am cautious in applying this authority to the present case, as the RPD's problematic analysis in *Bao* turned on the fact that the report of a particular organization, which gathered data on incidents of persecution, did not mention the specific incident upon which the claimant in that case relied. Arguably, this is a somewhat different analysis than relying on the CCE's more general description of the circumstances in which persecution occurs in a country.

[36] However, the Applicants also argue that, if the RPD's reasoning is as described above, then it amounts to an impermissible implausibility analysis. I consider this concern to have merit. As explained in *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 [*Valtchev*] at para 9, implausibility findings should be made only in the clearest of cases, i.e., only if the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the

manner asserted by the claimant. I do not consider it to be clear that the family members of a person persecuted for his sexual orientation in Nigeria could not also face persecution. Nor does the documentary evidence demonstrate this. The RPD noted that the CCE does not refer to such persecution of family members. But in the absence of documentary evidence indicating that such persecution does not occur, I agree that the concern raised by *Valtchev* applies and that this analysis is unreasonable.

E. *Well-Founded Fear of Persecution – Objective Basis*

[37] In the portion of the Decision falling under this heading, the reasoning is again difficult to follow. As the Applicants correctly point out, the requirement for a claimant to establish a well-founded fear of persecution has both subjective and objective components (see, e.g., *Csonka v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1056 at para 70). A claimant must establish a genuine subjective fear, and there must be an objective basis for this fear. The above heading suggests that this portion of the Decision is intended to address the objective basis for the Applicants' alleged fear. Indeed, the RPD begins its analysis by referencing CCE that identifies the targeting by family, community and police of people who engage in same-sex activity in Nigeria, as well as the criminalization of such activity. The RPD then notes that the Principal Applicant is only associated with a person who is allegedly bisexual, by being a family member.

[38] However, the RPD states no conclusion regarding the objective basis for the Principal Applicant's alleged fear. Instead, it states the conclusion that, due to credibility concerns, lack of documentary evidence, the absence of an arrest warrant from the police due to her husband's

sexuality, and the Applicants' ability to leave Nigeria with a valid US visa, the evidence shows a lack of subjective fear. While the RPD cites various bases for its conclusion that the Principal Applicant lacks subjective fear, I am inclined to the Respondent's view that the RPD's analysis was based significantly on the lack of CCE of family members of bisexual men being targeted for persecution. This demonstrates the RPD using the CCE not to assess the objective basis for the alleged fear, but to conclude that the Principal Applicant is not credible when she asserts that she holds that fear. This is effectively the same implausibility analysis that I have already found to be unreasonable.

[39] As noted above, the CCE is not the only basis upon which the RPD concludes that the Principal Applicant does not have a subjective fear. However, the RPD's analysis of the CCE appears sufficiently fundamental to its conclusion on subjective fear that it renders that conclusion unreasonable. Subject to the RPD's IFA analysis, which I will briefly address below, the overall lack of intelligibility in the RPD's use of the CCE and in particular its unreasonable use of the CCE in the subjective fear analysis render the Decision as a whole unreasonable.

F. *Internal Flight Analysis*

[40] While the RPD also concludes that the Applicants have an IFA in Abuja, I agree with the Applicants' submission that the IFA analysis is flawed in that it fails to consider the second prong of the test prescribed by *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (CA) [*Rasaratnam*]. That prong asks whether the conditions in the place considered to be an IFA are such that it would not be unreasonable in all the circumstances, including those particular to the claim, for the claimant to seek refuge there.

While the Decision notes that *Rasaratnam* prescribes a two-part test, it is silent on any application of the second part.

VI. **Conclusion**

[41] In conclusion, I find based on the above analysis that the Decision is unreasonable and must be set aside, with the matter to be returned to a differently constituted panel of the RPD for re-determination. It is therefore unnecessary for the Court to consider the other issues raised by the Applicants.

[42] Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-4732-19

THIS COURT'S JUDGMENT is that this application for judicial review is allowed, the Decision is set aside, and the matter is returned to a differently constituted panel of the RPD for re-determination. No question is certified for appeal.

"Richard F. Southcott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4732-19

STYLE OF CAUSE: ONYEKA MARY ANONYAI
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DATED: MAY 20, 2021

APPEARANCES:

Giselle Salinas FOR THE APPLICANTS

Meva Motwani FOR THE RESPONDENT

SOLICITORS OF RECORD:

Giselle Salinas FOR THE APPLICANTS
Barrister & Solicitor
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario