Federal Court  Cour fédérale

Date: 20220203

Docket: IMM-1492-21

Citation: 2022 FC 136

Ottawa, Ontario, February 3, 2022

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

HENRY OGHENEKEV EFERE AND EDMUND ONANEFE EFERE (MINOR BY HIS LITIGATION GUARDIAN HENRY OGHENEKEV EFERE)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASON

I. Introduction

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board [the "RPD"], dated December 22, 2020 and communicated to the Applicants on or about January 4, 2021, which rejected their refugee claim

and determined that the Applicants are not Convention Refugees and are not persons in need of protection [the "Decision"].

[2] The RPD determined that the Applicants have a safe and reasonable Internal Flight Alternative [IFA] in several cities in Nigeria.

II. Background

[3] The Principal Applicant, Henry Oghenekev Efere, and his son, Edmund Onanefe Efere [the "Co-Applicant"], [collectively, the "Applicants"] are citizens of Nigeria. The Applicants entered Ontario, Canada via the United States at the Buffalo/Fort Erie Border on November 28, 2019 and made a refugee claim upon arrival.

[4] The Principal Applicant's wife and daughter (both citizens of Nigeria) entered Quebec, Canada via the United States at the Lacolle Border on July 18, 2019 and made a refugee claim on the same day.

[5] Both refugee claims – that of the Applicants and their family – were heard jointly on September 9, 2020 by the RPD. Both claims were rejected and an appeal of both decisions was submitted jointly to the Refugee Appeal Board [the "RAD"] on or about January 13, 2021. The RAD dismissed the appeal of the Applicants' Decision on February 12, 2021, due to lack of jurisdiction on the grounds of paragraph 101(1)(e) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the "*Act*"]. The RAD decision regarding the Principal Applicant's wife and daughter was still pending at the time of this Application.

[6] The Applicants and their family allegedly fled Nigeria due to a well-founded fear of persecution from:

i. The Principal Applicant's traditional family members (*i.e.* Chief and Uncle) who were targeting the Principal Applicant's daughter for female genital mutilation [FGM]; and

ii. The Nigerian Police regarding a land dispute in which the Assistant Commissioner of Police [ACP] and local "land grabbers" sought to steal the Principal Applicant's land, which was given to the Principal Applicant as a fee for rendering legal services.

In order to steal the Principal Applicant's land, the land grabbers had him falsely criminally charged. These criminal charges were ultimately dismissed, but the ACP was able to successfully gain the Principal Applicant's land. The ACP continues to pursue the Principal Applicant.

The Principal Applicant has filed several petitions protesting the stealing of his land and seeking assistance from higher authorities.

[7] The RPD found the Applicants credible. However, their refugee claim was rejected on the basis of the existence of a viable IFA.

[8] The Applicants seek:

i. An Order in the nature of *certiorari* setting aside the Decision;

ii. An Order granting the Applicants a new hearing before a different RPD; and

iii. Such and further relief as counsel may advise and this Honourable Court permit.

III. Decision Under Review

[9] As stated above, the RPD found the Applicants to be credible. The RPD found that there was a link between the Applicants' fear of FGM and the Convention grounds as set out in section 96 of the *Act*, by reason of membership in their particular social group, women fearing and being subject to FGM in Nigeria, and their family.

[10] However, the RPD found no link between the Applicants' fear of persecution from the ACP and the Convention grounds because it does not appear to be vested in reasons of race, ethnicity, nationality, political opinion, religion, or membership in a particular social group. As such, the RPD found that these allegations are more appropriately assessed under subsection 97(1) of the *Act* (*i.e.* a person in need of protection).

[11] As stated above, the Applicants' refugee claim was rejected because the RPD found there was a viable IFA. The RPD identified Port Harcourt, Abuja, and Ibadan – all cities in Nigeria – as viable IFA cities upon consideration of the following:

- The many variables which may impede the ability to establish a claim, such as: the nature of the basis of claim; cultural, social, linguistic, educational, medical, psychological, economic, and other factors; and the formalities of the claim and hearing process.

- The Immigration and Refugee Board of Canada [IRB]'s "Chairperson's Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution."

  Specifically, in the context of the issue of IFA, the RPD considered concerns regarding the ability of the Applicants to travel safely to the IFA of Port Harcourt, and "religious, economic, and cultural factors," including "whether and how these factors affect claimants in the IFA."

- The decision of the RAD in file no. TB 7-19851, which has been designated by the Chair of the IRB as a RAD Reason of Interest Decision [RRID]. This RRID addresses IFA locations in various parts of Nigeria, including Port Harcourt, for claimants fleeing non-state actors.

  The RPD found the analysis provided in the RRID in respect to the viability of an IFA in Port Harcourt to be relevant and probative to the circumstances of the Applicants fleeing their traditional family members in their claim.

[12] The RPD focussed on Port Harcourt because the information provided in the Applicants' claim stated that their agents of persecution do not reside at this location and there was no evidence provided of familial, economic, or political ties to Port Harcourt.

[13] The RPD assessed the existence of an IFA using the well-established two-prong test. In applying this test, the RPD found:

i. It is safe for the Applicants to relocate to Port Harcourt. The Applicants had not demonstrated that, on a balance of probabilities, they would be subjected to a serious possibility of persecution or be personally subjected to a danger of torture, a risk to life, or risk of cruel and unusual treatment or punishment in Port Harcourt.

    a. The Principal Applicant's wife testified that she was not aware of any means or resources that the Principal Applicant's family may have to locate them in Port Harcourt.

    b. The Principal Applicant could not demonstrate any influence that the ACP would have outside of their jurisdiction.

    c. The Principal Applicant could not demonstrate that the ACP has the resources to locate him outside their jurisdiction, even if there may be some motivation to do so with the Principal Applicant having filed a civil suit against them.

ii. It is reasonable for the Applicants to relocate to Port Harcourt. The Applicants have not demonstrated, on a balance of probabilities, that it is unreasonable, in all circumstances, including those personal to the Applicants, to seek refuge in the identified IFA of Port Harcourt.

    a. The Principal Applicant has a bachelor's degree in law and has worked as a lawyer and in various other roles. The RPD found the Principal

Applicant's education and work history demonstrates an ability to find employment in Port Harcourt and adapt to relocation there.

b. The Applicants are fluent in English, a language also used in Port Harcourt.

c. The Applicants are able to practice their Christianity in Port Harcourt.

d. Based on the evidence before it, the RPD found that the Applicants and their family have no restrictions to relocating to Port Harcourt and would be able to do so safely.

e. The Applicants have not established that, on a balance of probabilities, the absence of relatives or friends in Port Harcourt meets the high threshold in their circumstances.

[14] Considering all the evidence and the submissions, the RPD found that there is a viable IFA for the Applicants in Port Harcourt and that the Applicants did not demonstrate that there is a serious possibility of persecution or that they would be subjected to risk of life, risk of cruel or unusual punishment or treatment, or danger of torture if they were removed to Nigeria. Therefore, the Applicants were found to not be Convention refugees or persons in need of protection and their claim was rejected.

IV. Issues

[15] The issue is whether the RPD's Decision that the Applicants have a viable IFA was reasonable.

V. Standard of Review

[16] The standard of review is reasonableness [*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*] at paragraph 25].

VI. Analysis

[17] As stated above, the existence of an IFA is assessed using a two-prong test [*Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 (CA)]:

1. On a balance of probabilities, the Board must be satisfied that there is no serious possibility of the claimant being persecuted in the part of the country to which it finds an IFA exists; and

2. The conditions in the part of the country considered to be an IFA must be such that it would not be unreasonable, in all the circumstances, including those particular to the claimant, for them to seek refuge there.

[18] Once the issue of IFA is raised, the onus is on the claimant to show that they do not have an IFA. However, the decision maker cannot base a finding that there is an IFA without sufficient evidence, solely on the basis that the claimant has not fulfilled the onus of proof. The claimant does not need to personally test the viability of an IFA.

[19] In determining whether there is an objective basis for fearing persecution in the IFA, the decision maker must consider the personal circumstances of the claimant and not just general evidence considering other persons who live there. An IFA cannot be speculative or theoretical only; it must be a realistic, attainable option. In this regard, the claimant must be genuinely able to access domestic protection and that protection must be meaningful.

[20] The second prong of the IFA test carries a very high threshold, requiring the existence of conditions that would jeopardize the life and safety of a claimant in traveling or temporarily relocating to the IFA. In addition, it requires actual and concrete evidence of such conditions [*Ranganathan v. Canada (Minister of Citizenship and Immigration)*, [2001] 1 FCR 164 at paragraphs 15-17].

[21] The Applicants argue that the RPD erred in their Decision in three ways:

i. The RPD erred in its IFA analysis;

ii. The RPD ignored or misapprehended the evidence; and

iii. The RPD erred in its analysis of state protection.

[22] The Applicants claim that the RPD failed in its interpretation and application of both prongs of the IFA test:

i. With respect to the first prong, the Applicants state that the RPD ignored or failed to consider the means and resources of the ACP and their connections with other members of the police force throughout Nigeria.

ii. With respect to the second prong, the Applicants state that the RPD erred in finding Port Harcourt was a reasonable IFA for several reasons:

    a. Port Harcourt is closer to the Principal Applicant's native region. The Applicants have previously relocated multiple times within Lagos (another large and populous city) and were unable to evade the Principal Applicant's family who wish to subject the Principal Applicant's daughter to FGM.

    b. The ACP is able to access the resources of the Nigerian police to find them. Thus placing their lives at risk, regardless of where they may relocate, and underscoring the Applicants' concerns that they would not have access to state protection if required.

    c. The Principal Applicant must register his address with the Nigerian Bar Association and this information is publicly accessible. The Applicants claim this makes it easy for the agents of persecution to locate them.

    d. The Principal Applicant does not have a history of employment aside from law and it is not financially feasible for him to pursue other education.

e. The fact that the Applicants do not have family or friends in Port Harcourt is relevant.

   The National Documentation Package [NDP] demonstrates that it is difficult for people to relocate to another Nigerian state without familial support. This applies to the Applicants.
   Contrary to the RRID, the Applicants are fleeing both state actors (*i.e.* the ACP) and non-state actors (*i.e.* traditional family members).

[23] The Applicants rely on several pieces of the Principal Applicant's wife's testimony in support of the allegation that the RPD ignored or misapprehended the evidence. The Applicants claim that the RPD erred in finding that the agents of persecution being able to find the Applicants via an internet search did not demonstrate that Port Harcourt would be unsafe. In fact, the Principal Applicant's traditional family had been able to locate the Applicants in Lagos multiple times. The Applicants claim that the RPD also erred in ignoring the Applicants testimony that the police operate throughout Nigeria and share intelligence across states.

[24] In addition, the Applicants claim that they have demonstrated that the ACP is motivated to find them. The Principal Applicant testified that the ACP has continued to contact him and his law office, including threatening his life.

[25] The Applicants further claim that the RPD omitted relevant evidence in its Decision (*i.e.* the Principal Applicant's testimony that the ACP continues to have an interest in finding him, which is corroborated by the Affidavit of Oluyemi Sokunbi, and the Principal Applicant's

testimony of his pending petitions before the police regarding the land dispute). This omission demonstrates that the RPD did not consider the totality of the evidence, which is a reviewable error.

[26] The Applicants also claim that the RPD erred in its analysis of state protection. Nations should be presumed capable of protecting their citizens. To rebut this presumption, a claimant must present "clear and convincing" evidence that protection would not be forthcoming [*Ward v. Canada*, [1993] 2 SCR 689 at paragraph 48]. The Applicants state that they have presented clear and convincing evidence that Nigerian state protection would not be forthcoming:

i. The Principal Applicant sent eight petitions requesting an investigation of the ACP to three governing bodies – no investigation has yet been commenced and there has been no accountability or disciplinary action.

ii. Also, these petitions were sent to Abuja, though the ACP is in Lagos, demonstrating the connection between the states.

iii. The false criminal charges were not withdrawn until the Attorney General was involved.

[27] Furthermore, the Applicants state that the NDP relied on by the RPD stating that the Nigerian police are uncoordinated and ineffective has been removed since April 30, 2019. An article cited by the RPD states that there is corruption, abuse of power, mismanagement, and insufficient funding in the Nigerian police force.

[28] Based on the above, the Applicants claim that the RPD erred in finding that the Applicants did not demonstrate that the ACP had the means and resources to locate them in Port Harcourt.

[29] The Respondent argues that the RPD reasonably determined that the Applicants did not displace their onus on the first prong of the IFA test. The Applicants were unable to furnish any details about how the Principal Applicant's family would be able to locate the Applicants in Port Harcourt. In addition, the RRID indicated a greater risk of discovery if the Applicants lived with a family member in the proposed IFA and the Applicants testified that they had no family in Port Harcourt.

[30] The Respondent reiterated the RPD's findings that the ACP did not have the resources to locate them in Port Harcourt and that the outstanding civil lawsuit was immaterial. Furthermore, the Respondent states that it is presumed that the RPD considered all of the evidence and that the RPD does not need to refer to every argument that is raised in their Decision.

[31] The Respondent also argues that the RPD reasonably concluded that the Applicants failed to establish the proposed IFA is unreasonable. There is a high threshold for the second prong of the IFA test. The RPD noted the high education that the Principal Applicant and his wife have achieved and, as such, the Applicants' claim that they would not be able to find comparable employment and accommodation was not established. Similarly, the RPD concluded that language, religion, and ability to travel safely were not a detriment to the reasonability of the proposed IFA. Finally, the RPD reasonably found that the Applicants' lack of friends and family

in the IFA is not a consideration because they Applicants had not established that their lives or safety are jeopardized.

[32] Lastly, the Respondent argues that the Applicants' submissions on state protection should not be considered because the RPD did not engage in an analysis of state protection – the Applicants' refugee claim was dismissed solely on the basis on an IFA.

[33] As stated above, a tribunal is not required to refer to every piece of evidence before it in its Decision. It is presumed that the tribunal has considered all the evidence presented to it unless the contrary can be shown [*Amadi v. Canada (Citizenship and Immigration)*, 2019 FC 1166 at paragraph 50; *Ogunkunle v. Canada (Citizenship and Immigration)*, 2021 FC 111 at paragraph 13]. The Applicants have not shown that the RPD did not consider all the evidence, only that it did not expressly mention particular pieces. Nevertheless, it does appear that the RPD did fail to consider relevant testimony and evidence.

[34] The RPD appears to have failed to consider the evidence that the Principal Applicant's family has previously located the Applicants in Lagos on three occasions. Lagos is a significantly more populous city than Port Harcourt, and is physically farther away from the region where the Principal Applicant's family reside than Port Harcourt. In addition, evidence was provided that the Principal Applicant is required to register his address with the Nigerian Bar Association and that this is address is made publicly accessible. This evidence demonstrates that there is a serious possibility of persecution of Principal Applicant's daughter at the hands of his family should they relocate to Port Harcourt.

[35] The materials that the RPD cites to demonstrate that the ACP, as a member of the Nigerian Police Force, suffers from insufficient funding and equipment and that they do not patrol local communities, does not appear in the NPD materials. Furthermore, this information, if it did exist in the NDP, supports the Applicants' claim that there is a lack of state protection at their disposal as the ACP and their associates have not been held responsible for their actions and have continued to seek out the Principal Applicant. Though the Principal Applicant was able to have his false criminal charges dropped with the assistance of the Attorney General, there is a continued lack of accountability of the ACP and a serious possibility of persecution at the hands of the ACP has not been displaced.

[36] The evidence shows that the Applicants and their family would likely be subjected to a serious possibility of persecution and be personally subjected to danger of torture, risk to life, or a risk of torture or cruel and unusual treatment or punishment in Port Harcourt. As stated above, the Applicants do not need to personally test the viability of an IFA. The RPD's finding that the Applicants and their family have not demonstrated, on a balance of probabilities, that they would be subjected to a danger of torture, a risk to life, or a risk of cruel and unusual treatment or punishment in Port Harcourt, is unreasonable.

[37] As noted above, the second prong of the IFA test has a very high threshold and requires the existence of conditions that would jeopardize the life or safety of the claimant. The Decision was reasonable in finding that the Applicants would be able to practice their religion in Port Harcourt, as well as be able to use English there.

[38] However, the RPD erred in finding that there was no evidence to suggest that there are limitations to securing accommodations if one is not a resident of Port Harcourt. The NDP before the RDP provided evidence that spoke to the difficulty non-indigenes may experience when moving to a new state without familial connections or financial means. As acknowledged by the RPD, the Applicants testified that they do not have connections in Port Harcourt.

[39] In addition, the RPD cited a “long and varied work history in Nigeria in several vocations” as support that the Principal Applicant and his wife would be able to find employment in Port Harcourt. While the Principal Applicant and his wife have had success in obtaining high levels of education, there is no evidence of the varied work history that the RPD refers to – in fact, the evidence shows that the Principal Applicant and his wife have only worked in their respective professions of lawyer and microbiologist. The RPD did not cite where in the record they found this evidence of a long and varied work history.

[40] Given the errors in the RPD’s Decision in citing evidence that does not in fact exist, as well as the evidence demonstrating a serious possibility of persecution in the proposed IFA by the Principal Applicant’s family, the Decision with respect to finding a viable IFA is unreasonable.

JUDGMENT in IMM-1492-21

THIS COURT'S JUDGMENT is that

1. The Application is allowed and the matter is remitted to a different panel for reconsideration.
2. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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