Federal Court Cour fédérale

Date: 20220407

Docket: IMM-2427-21

Citation: 2022 FC 503

Ottawa, Ontario, April 7, 2022

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

UYI OSEMWENKHAE

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Context and underlying decision

[1] This is an application for judicial review of a decision of the Refugee Appeal Division [RAD] dated March 19, 2021, which confirmed the decision of the Refugee Protection Division [RPD] that the applicant had a viable internal flight alternative [IFA] in Lagos.

[2] The applicant, Uyi Osemwenkhae, is a 39-year-old citizen of Nigeria and a member of the Bini ethnic group, a group which is situated primarily in Edo State and is predominantly Christian. His wife, to whom he has been married since 2016, remains in Nigeria. Mr. Osemwenkhae once owned a farm in the Egor district of Benin City, where he cultivated yams, cassavas, plantains and pineapples. On February 26, 2018, Fulani herdsmen invaded Mr. Osemwenkhae's community and raided and destroyed his farm. He suffered greatly from the destruction as his farm was his main source of income; a further attack took place on March 10, 2018. Along with other farm owners from his area, Mr. Osemwenkhae complained to the police following both incidents and participated in a government protest that same month, during which he spoke out publicly against the Fulani herdsmen. Mr. Osemwenkhae claims that Fulani herdsmen are now looking to track him down for the purpose of making an example out of him so that no one again speaks out publicly against them. On the strength of a United States visa, Mr. Osemwenkhae fled Nigeria on March 23, 2018, for the United States and two days later entered Canada, where he filed a claim for refugee protection.

[3] During his hearing before the RPD on November 26, 2019, Lagos was identified as a possible IFA; Mr. Osemwenkhae filed additional submissions on this issue on January 6, 2020. In a decision dated January 22, 2020, the RPD determined that Lagos was a viable IFA for Mr. Osemwenkhae. Although the RPD accepted as credible his allegation that Fulani herdsmen destroyed his farm, the RPD made several uncontested credibility findings in relation to its IFA analysis. Regarding the first prong of the test, the RPD found that Mr. Osemwenkhae had not demonstrated, on a balance of probabilities, that the Fulani herdsmen had the means or the motivation to locate him in Lagos. First, the RPD gave little weight to Mr. Osemwenkhae's

claim of a potential motive for retribution on the part of the Fulani herdsmen, that being the fact that he filed complaints to the police, as he did not refer to any such police complaints in his Basis of Claim [BOC]. Furthermore, the RPD was not satisfied with Mr. Osemwenkhae's explanation as to why he failed to amend his BOC with the information that his wife provided to him regarding Fulani herdsmen visiting his parents' house or as to why he failed to submit this information prior to the hearing. Second, the RPD found that the objective documentary evidence did not support Mr. Osemwenkhae's claim that Fulani herdsmen have the ability to locate him in Lagos. Regarding the second prong of the test, the RPD found that, in light of all of Mr. Osemwenkhae's personal circumstances, and on a balance of probabilities, it would not be unduly harsh or objectively unreasonable for him to relocate to Lagos. According to the RPD, his education, work experience and spoken language weigh in favour of him being able to find employment and housing in Lagos.

[4] Before the RAD, Mr. Osemwenkhae attempted to submit new evidence, including letters from his father, wife and a friend, newspaper articles describing the situation involving the Fulani herdsmen in Nigeria, and a copy of the UNHCR *Guidelines on International protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/03/04 (23 July 2003) [UNHCR Guidelines]. In a decision dated March 19, 2021, the RAD rejected all of his new evidence except for the letter from his wife; the RAD found that the UNHCR Guidelines and the articles that Mr. Osemwenkhae submitted were available prior to the RPD decision. Similarly, the letters from his father and his friend recounted events that took place prior to the RPD decision and were therefore rejected as not meeting the test set out in subsection 110(4) of

the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act]; it was reasonable to expect the letters to have been submitted to the RPD prior to its decision, and there existed no reasonable explanation as to why they were not. Although the RAD accepted the letter from Mr. Osemwenkhae's wife, it gave it little weight as the letter was vague and provided few details regarding the purported return of the Fulani herdsmen to the home of Mr. Osemwenkhae's father where she was living. As regards the viability of Lagos as an IFA, the RAD agreed with the RPD that Mr. Osemwenkhae is not at risk in Lagos and could reasonably relocate there in light of his personal circumstances. Regarding the first prong of the test, Mr. Osemwenkhae did not contest the RPD's finding regarding his omission to mention in his BOC the complaints that he purportedly filed with the police as an explanation for the motivation of Fulani herdsmen to locate him. The RAD agreed with the RPD that this omission was material to his claim and drew a negative inference with respect to his credibility. The RAD further found that Mr. Osemwenkhae had not provided sufficient evidence to demonstrate that Fulani herdsmen have the means to locate him in Lagos. Moreover, Mr. Osemwenkhae did not challenge the RPD's findings on the reasonableness of Lagos as an IFA.

II. Standard of review

[5] Both parties agree that the applicable standard for reviewing the RAD's decision on the merits is reasonableness. I agree. There is a presumption that reasonableness is the applicable standard when reviewing an administrative decision, and none of the exceptions apply in this case (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16-17 [*Vavilov*]). As noted by the majority in *Vavilov*, 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 para 85). This Court should intervene only if the decision under review does not bear "the hallmarks of reasonableness – justification, transparency and intelligibility" and if the decision is not justified "in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99).

III. Analysis

[6] Mr. Osemwenkhae challenges the RAD's decision as it relates to the manner in which the new documents were dealt with. Subsection 110(4) of the Act provides the criteria for the RAD to admit new evidence:

Evidence that may be presented	**Éléments de preuve admissibles**
110(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.	110(4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

[7] With respect to the UNHCR Guidelines, Mr. Osemwenkhae concedes having mistakenly referred to them as new documents, when they were not. That said, he argues that the RAD should have nonetheless addressed them in its decision. First of all, I accept that the UNHCR Guidelines are not new documents in the sense of being new evidence but rather should have been introduced as doctrinal or legal support for Mr. Osemwenkhae's position. That said, Mr. Osemwenkhae argues that the RAD was obliged to consider the provisions of the UNHCR

Guidelines with the view of determining whether Canada was complying with its international obligations. When asked to be specific, Mr. Osemwenkhae's counsel was hard-pressed to identify provisions of the UNHCR Guidelines that the RAD somehow failed to respect. In short, Mr. Osemwenkhae simply did not demonstrate in a concrete manner how the RAD failed to consider the principles set out in the UNHCR Guidelines. Although I accept that the RAD "cannot reasonably interpret a Canadian provision in a manner that is incompatible with the obligations imposed on Canada by international law" (*Elve v Canada (Citizenship and Immigration)*, 2020 FC 454 at paras 78-79; *Vavilov* at para 114), the fact that the RAD did not specifically refer to the UNHCR Guidelines does not mean that the principles set out therein were disregarded. As an example, Mr. Osemwenkhae refers to sections of the UNHCR Guidelines that refer to the assessment of the motivation of agents of persecution to locate their victims and state protection. However, the RAD did consider the issue of motivation and determined that there was simply not enough evidence to support Mr. Osemwenkhae's assertion that the Fulani herdsmen were motivated to track him down in Lagos. Also, since the RAD found that Mr. Osemwenkhae did not demonstrate, on a balance of probabilities, that Fulani herdsmen would have the motivation and the means to locate him in Lagos, the RAD did not have to consider whether state protection would be available. Mr. Osemwenkhae says that he does not see from the RAD decision where the UNHCR Guidelines were followed; for my part, I do not see where they were not.

[8] As for the news articles that Mr. Osemwenkhae was seeking to introduce, he refers me to excerpts which suggest that among the non-state actors of persecution, herders and farmers participating in armed groups have become increasingly relevant. That may be so, however, I

have not been persuaded that the excerpts of the documentary evidence in any way undermine the findings of the RAD on the issue of the viability of Lagos as an IFA. As for the letter from Mr. Osemwenkhae's wife, he acknowledges that it was accepted as new evidence but argues that it should have been given more weight. I see no reason to interfere in the findings of the RAD on this issue.

[9] As regards the letter from his friend, which was not admitted as new evidence by the RAD on account of it referring to events that took place prior to the decision of the RPD, Mr. Osemwenkhae argues that the last sentence in the letter states that his friend also left Nigeria on account of attacks by Fulani herdsmen and that this component of the letter should have been accepted in support of his contention that the Fulani herdsmen are a threat to him. Putting aside the fact that the letter does not mention when his friend left Nigeria, the fact remains that the RAD accepted that the Fulani herdsmen were a threat to farmers and accepted Mr. Osemwenkhae's claim that his own farm was attacked by that group. I fail to see what the fact that his friend also faced the same challenges with the Fulani herdsmen at some point would add to the equation. Mr. Osemwenkhae says that the statement from his friend was relevant and on that basis alone should have been accepted. I cannot agree. Although relevance is one of the factors set out in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385, and *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96, for allowing new evidence on appeal before the RAD, subsection 110(4) of the Act must nonetheless be met as a first threshold. As I put to Mr. Osemwenkhae's counsel, relevance by itself is of no assistance.

[10] Finally, the style of cause should be changed from “Minister of Immigration, Refugees and Citizenship” to “Minister of Citizenship and Immigration” pursuant to subsection 5(2) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, and subsection 4(1) of the Act. Otherwise, the present application is dismissed.

JUDGMENT in IMM-2427-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;
2. The style of cause is amended to indicate the Minister of Citizenship and Immigration as the proper respondent;
3. There is no question for certification.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2427-21
STYLE OF CAUSE:	UYI OSEMWENKHAE v MINISTER OF CITIZENSHIP AND IMMIGRATION
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