Federal Court  Cour fédérale

Date: 20220506

Docket: IMM-1458-21

Citation: 2022 FC 674

Toronto, Ontario, May 6, 2022

PRESENT: Madam Justice Go

BETWEEN:

CHUKWUMA SUNDAY KANU
GLORIA CHINENYE KANU
AMARACHI ELMA KANU
DAVID CHIBUIKE KANU
HANS AMAOBI KANU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Chukwuma Sunday Kanu is a citizen of Nigeria. He is from Biafra, a region in South East Nigeria populated largely by people of the Igbo ethnicity. Mr. Kanu and his wife Ms. Gloria

Chinenye Kanu have three minor children, all of whom are citizens of Nigeria [together the Applicants].

[2] Mr. Kanu is related to Nnamdi Kanu, the leader of the Indigenous People of Biafra [IPOB], a group fighting for the separation of the Biafran region from the rest of Nigeria. The Applicants are not members of IPOB.

[3] In September 2017, the Nigerian government ordered a crack down on the activities of IPOB Members in Umuahia. During this raid, the Nigerian armed forces shot and killed Mr. Kanu's brother and sister. Soon after this incident, Mr. Kanu's mother died of shock. At this time, the Applicants were living in Lagos.

[4] On November 30, 2017, a group of IPOB members appeared at the burial for Mr. Kanu's family members in Umuahia and sought control of the body of Mr. Kanu's brother, who was a member of IPOB. Mr. Kanu, who had travelled from Lagos to attend the ceremony, blocked the IPOB members from disrupting the burial. The IPOB members called him a traitor, a saboteur, and an enemy, but they eventually left. That night, a group of men returned to Mr. Kanu's family's compound, banging on the door and yelling for him. Mr. Kanu assumed that these individuals were IPOB members seeking revenge. He fled and returned to Lagos. Neither Mr. Kanu's sisters, who live in Port Harcourt, nor Mr. Kanu have returned to Umuahia since this incident.

[5] On the following day, Ms. Kanu received a threatening phone call, and two more calls of threat subsequently. Afraid for their safety, the Applicants left Nigeria for the United States on December 12, 2017. On December 28, 2017, the Applicants crossed the border into Canada and made their refugee claims based on fear of the IPOB.

[6] The Applicants' hearing before the Refugee Protection Division [RPD] took place on November 26, 2019. On February 18, 2020, the RPD rejected the Applicants' claims under s. 96 and s. 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], finding that they were credible but had a valid Internal Flight Alternative [IFA] in Ibadan. The RPD based the analysis of both prongs of the IFA test on a Jurisprudential Guide T87-19851 [JG], which was revoked on April 8, 2020, after the RPD's decision.

[7] The Applicants appealed to the Refugee Appeal Division [RAD], and requested that new evidence be admitted, i.e. a sworn affidavit dated March 16, 2020 from Ms. Kanu's brother about an assault that he experienced on December 27, 2019 from members of IPOB while he was staying at the Applicants' home.

[8] On February 15, 2021, the RAD rejected the appeal and upheld the findings of the RPD that the Applicants were credible but had an IFA in Ibadan [Decision]. The RAD also rejected the brother's affidavit on the basis that the incident occurred in December 2019, which was after the Applicants' RPD hearing but before the RPD made its decision in February 2020.

[9] The Applicants seek judicial review of the RAD Decision, arguing that the RAD erred in relying on a revoked JG, and unreasonably assessed both the safety and the reasonableness of relocation to Ibadan. I find the Decision reasonable and dismiss this application.

II. Issues and Standard of Review

[10] This application raises the following issues: (1) was the RAD unreasonable in upholding the RPD's reliance on a now-revoked Jurisprudential Guide? (2) did the RAD unreasonably analyze the first prong of the IFA test? and (3) did the RAD unreasonably assess the second prong of the IFA test?

[11] The parties agree that the standard of review is reasonableness, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[12] Reasonableness is a deferential, but robust, standard of review: *Vavilov*, at paras 12-13. The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible, and justified: *Vavilov*, at para 15. 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. Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences: *Vavilov*, at paras 88-90, 94, 133-135.

[13] For a decision to be unreasonable, the applicant must establish that the decision contains flaws that are sufficiently central or significant: *Vavilov*, at para 100. Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances: *Vavilov*, at para 125. Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep": *Vavilov*, at para 100.

III. Analysis

[14] The parties agree on the test for establishing a viable IFA, which is that the claimant is (1) unable to establish a serious possibility of persecution in the proposed IFA location and (2) unable to demonstrate that it would be unreasonable in the circumstances to require them to seek safety in the IFA.

A. *First prong of the IFA test*

(1) Did the RAD err in rejecting the new evidence?

[15] The Applicants argue that the RAD erred by refusing to consider, as new evidence, the sworn affidavit from Ms. Kanu's brother stating that he was physically assaulted by members of IPOB on December 27, 2019 when he was living at the Applicants' former home in Lagos, and the IPOB members came by to ask for the Applicants.

[16] The Applicants submit that the RAD erred in failing to apply the requirements of subsection 110(4) of the *IRPA* with flexibility as the Federal Court of Appeal [FCA] stated in

Canada (Citizenship and Immigration) v Singh, 2016 FCA 96 [*Singh*] at para 64: "[i]t goes without saying that the RAD always has the freedom to apply the conditions of subsection 110(4) with more or less flexibility depending on the circumstances of the case." The Applicants argue that in the present case, particularly given the significance of the new evidence to the Applicants' claim, and that it specifically rebutted a finding of the RPD on the determinative issue, the RAD should have employed greater flexibility in deciding whether to consider the new evidence.

[17] The Respondent submitted that the "flexibility" referenced in para 64 of *Singh* is related to the "implied conditions" of admissibility (i.e., credibility, relevance and materiality, etc.) as opposed to the explicit conditions under the statute.

[18] I am not persuaded by the Applicants' argument. Irrespective of what the FCA meant by "flexibility" in para 64 of *Singh*, the Applicant, in my view, has taken the FCA's comment out of context.

[19] As the FCA noted at paras 34 and 35 of *Singh*:

> [34] There is no doubt that the explicit conditions set out in subsection 110(4) have to be met. Accordingly, only the following evidence is admissible:
>
> - Evidence that arose after the rejection of the claim;
> - Evidence that was not reasonably available; or
> - Evidence that was reasonably available, but that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection

> [35] <u>These conditions appear to me to be inescapable and would leave no room for discretion on the part of the RAD.</u>
>
> [emphasis added]

[20] In other words, the FCA made it quite clear that for evidence that arose before the rejection of the claim to be admissible, such evidence must either be "not reasonably available", or is "reasonably available, but that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection."

[21] In this case, the incident described in the affidavit occurred before the RPD made its decision in February 2020. As the Decision rightly noted, the relevant time period for new evidence under s. 110(4) of *IRPA* is "not the hearing of the claim, but rather the rejection of the claim." In seeking to admit the affidavit, the Applicants provided no explanation whatsoever as to why the evidence was not provided sooner nor any detail as to how the Applicants first became aware of the incident. Applying *Singh*, and given the lack of explanations provided by the Applicants about their failure to file the affidavit prior to the RPD's rejection, it was reasonable for the RAD to find the affidavit does not meet the requirements of s.110(4) of *IRPA*.

(2) Did the RAD err in its analysis of the first prong?

[22] The Applicants argue that the RAD erred in its analysis of the first prong of the IFA test by requiring the Applicants to provide evidence of recent attempts by IPOB to locate the Applicants after they fled the country.

[23] The RAD found as follows: “While the Appellants point to new evidence proffered in this appeal, as the evidence was deemed inadmissible, it remains there is no evidence of IPOB continuing to look for the Appellants in Nigeria or Lagos.”

[24] The Applicants argue that this was unreasonable based on *Abbas v Canada (Citizenship and Immigration)*, 2019 FC 1576 [*Abbas*] at para 28, in which Justice Ahmed was “not persuaded by the Respondent’s position supporting the RAD’s determination that Islamabad was a viable IFA for the reason that no issues had arisen with the agents of persecution since the time of relocation.” Justice Ahmed found that “[a]lthough assaults have not materialized yet, that does not preclude a serious possibility of the Applicants being persecuted in Islamabad when they are discovered by the Principal Applicant’s family members.” Similarly, the Applicants argue that the fact that there is no evidence of threats or attempts to locate them (other than the new evidence deemed inadmissible) since they fled from Nigeria does not preclude a serious possibility that they continue to be a target of IPOB and that they risk being located in Nigeria, including specifically in Ibadan, if they were to relocate.

[25] In my view, *Abbas* can be distinguished as the agent of persecution in that case were close family members, who still had ties with the applicant’s family in Pakistan. It was on that basis that the Court found the applicants’ whereabouts “would eventually become known” to the feared agents of persecution.

[26] The Applicants also point to *Losada Conde v Canada (Citizenship and Immigration)*, 2020 FC 626 at para 91, in which Justice Russell found that while the agent of harm had not

contacted the applicants' family recently, "they would have no reason to do so if they know he is out of the country. This does not mean that they will not murder the Applicants if they return." Similarly, in *Rivera Benavides v Canada (Citizenship and Immigration)*, 2020 FC 810 at para 75, Justice Little commented that while there was no evidence the agents of harm were looking for the applicants, there was also no evidence that they had lost interest.

[27] I agree with the Respondent that these two cases arguably involved more serious threats than the case at hand.

[28] More significantly, it was not unreasonable for the RAD to consider in this case—as one factor among many—that there was no evidence of the IPOB continuing to look for the Applicants after they left Nigeria. The RAD also reviewed the country condition documents about the nature of IPOB, including a source from Amnesty International [AI] which does not recognize IPOB as violent, before concluding that the Applicant has not established that IPOB would be motivated to find and harm them in the IFA. As well, the RAD reviewed documentary evidence in assessing whether IPOB has the means to find the Applicants and concluded that they did not.

[29] The Applicants further argue that the RAD ignored evidence and failed to consider the personal nature of their problems with IPOB, arguing that simply because the group advocates for peaceful protest does not mean that they would not be motivated to locate and harm the Applicants. The Applicants submit that the country condition documents in the National Documentation Package [NDP] describe IPOB as a group that has been labelled a terrorist

organization and that is clearly capable of violent action. I note, however, that the labelling of IPOB as a terrorist organization was made by the Nigerian Government, which has initiated a crackdown on the organization.

[30] The RAD noted country condition documents indicating that the IPOB were largely peaceful and are predominately committed to achieving their goal of an independent state. The RAD found that "there is no suggestion in the country condition documents that [the IPOB] actively pursue Biafran individuals who they perceive to not agree with their cause or non-politically minded civilians, such as [Mr. Kanu] for refusing them entry to a burial." These findings, in my view, were reasonably supported by the objective evidence found in the NDP.

[31] The Applicants finally argue that the RAD erred by dismissing their testimony regarding IPOB's ongoing motivation to harm them, given that the RPD concluded they were credible witnesses and the RAD upheld the RPD's credibility assessment. The Applicants point to *Tamayo Valencia v Canada (Citizenship and Immigration)*, 2018 FC 1013 [*Tamayo*] at paras 22-25, in which Justice Gleeson found that the RPD made inconsistent credibility findings, as it was unclear which parts of the narrative the RPD believed and which it did not, particularly with respect to an event that was "of particular importance when assessing the reasonableness of the IFA finding."

[32] I reject the Applicant's argument. Unlike *Tamayo*, the credibility findings in this case were consistent and unambiguous. Besides, as the Respondent submits, it was open to the RAD

to accept that the incident at the burial and subsequent threatening phone calls had occurred, but then to find that there was a lack of objective evidence of risk in the IFA.

B. *Second prong of the IFA test*

(1) Did the RAD err in relying on the Revoked Jurisprudential Guide?

[33] The RAD found that the RPD did not err in relying on the JG, which was revoked by the Immigration and Refugee Board [IRB] on April 8, 2020 because it was based on country conditions documentation that was not up to date. As the Respondent points out, the reason for the revocation was that developments in Nigeria, including those in relation to relocation by single women in specific IFAs, had affected the value of the decision as a jurisprudential guide: *AB v Canada (Citizenship and Immigration)*, 2021 FC 90 at para 47.

[34] With respect to the JG, the RAD found as follows:

> [16] …While the JG was revoked, the framework of the decision was nevertheless designated as a Reason of Interest. The IRB's website states:
>
> > The *framework of analysis* of the revoked jurisprudential guide, absent any of the factual findings, *will be identified as a RAD Reasons of Interest decision*. The framework includes the legal test for identifying a viable internal flight alternative as well as the seven factors set out at paragraphs 14-15 and 21-30 [emphasis added by RAD]
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> [17] Therefore, the mere fact of the revocation of the JG does not mean that any previously reliance on it, must automatically be nullified. For example, a reason for the revocation related to updated evidence regarding the ability of single women to relocate to an IFA in Nigeria, which does not apply to the circumstances of the Appellants. In any event, I have independently assessed the evidence as it relates to IFA in this case and agree with the RPD's conclusions for the reasons set out below.

[35] The Applicants do not dispute that, as the RAD noted, the framework of the JG had been designated as a Reason of Interest - however, the Applicants argue that the RPD went beyond merely applying the framework. The Applicants point to the following paragraphs of the RPD decision as examples of the RPD's heavy reliance on the JG:

> [31] The Jurisprudential Guide, on the other hand, states that internal relocation in Nigeria, particularly in the Central and South regions, is generally considered to be viable for refugee claimants fearing non-state actors.
>
> [32] …I adopt and apply the reasoning in the Jurisprudential Guide to conclude that Ibadan would not be unreasonable or unduly harsh regarding religion, given the prevalence of the Christian faith there.
>
> …
>
> [34] While the documentary evidence indicates that discrimination on the basis of indigene status in the context of government jobs is prevalent throughout Nigeria, it also indicates, as cited in the Jurisprudential Guide, that indigene status is less important to live and work in big cities.…

[36] Based on these components of the RPD decision, the Applicants argue that the RAD erred in upholding the RPD's findings. The Applicants rely on case law holding that a decision of the RAD or RPD is unreasonable where it is clear that it relied too heavily on a revoked JG. Citing *Liang v Canada (Citizenship and Immigration)*, 2019 FC 918 at para 10 ("the revocation of the document…which the RPD expressly adopted must be taken to weaken its finding in this respect"), the Applicants argue the nature and degree of the RPD's reliance on the JG weakened its conclusions to the point of being unreasonable, and the RAD perpetuated this error.

[37] I disagree with the Applicants. As a starting point, it is worth repeating that I am reviewing the decision made by the RAD, not the one made by the RPD. While the RAD did

mention the JG in the context of the second prong of the IFA test and suggested the reason for its revocation "does not apply to the circumstances of the [Applicants]", the RAD also stated it had "independently assessed the evidence as it relates to IFA in this case."

[38] When examining the RPD findings, the RAD remarked that the RPD "utilized the framework of the former JG/Reason of Interest" regarding the second prong, and "relied on country documents that were valid." This, in my view, demonstrates an understanding by the RAD of the limited applicability of the JG, consistent with the IRB's designation of the JG as a Reasons of Interest Decision.

[39] More importantly, I find that the RAD conducted its own analysis of the second prong, based on the evidence submitted by the Applicants as well as documents referred to in the Response to Information Request. The RAD's analysis at paragraphs 33 to 36 of the Decision focused on the Applicants' background, their language capability, employment history, religion as well as the relevant country conditions in the proposed IFA, instead of simply relying on the findings in the JG.

[40] Thus, read as a whole, the Decision reflects that the RAD independently assessed the evidence regarding the IFA before confirming the findings of the RPD.

[41] The Applicants rely on *Liu v Canada (Citizenship and Immigration)*, 2020 FC 576 at paras 68-72, which found that the decision was improperly influenced by a jurisprudential guideline, given that the Member used similar wording and relied on similar evidence, as well as

making the same error for which the jurisprudential guideline had been revoked. However, as the Respondent points out, the case before me can be readily distinguished as the RAD herein did not reproduce word for word the JG nor did it integrate an erroneous finding from the JG.

[42] The Respondent argues that the RAD's approach has been accepted by numerous decisions of the Federal Court, which declined to intervene when the RAD made a decision based on the applicants' individual circumstances. For example, in *Onjoko v Canada (Citizenship and Immigration)*, 2020 FC 1006 [*Onjoko*], Justice Gleeson found as follows:

> [24] This Court has held that the revocation of a JG that was in force and adopted by the RAD at the time a decision was rendered will undermine support for the RAD's findings on the issues for which the JG was relied upon (*Liang v Canada (Citizenship and Immigration)*, 2019 FC 918 at para 10 and *Cao* at para 39). However, **where the RAD refers to a JG but recognizes the applicants' specific circumstances and comes to its own conclusions on the facts, the RAD's reliance on the JG will not necessarily weaken the conclusions reached to the point of unreasonableness** (*Agbeja v Canada (Minister of Citizenship and Immigration)*, 2020 FC 781 at paras 77-78).
>
> [emphasis added]

[43] In this case, I find that the RAD did not rely on the JG before confirming the findings of the RPD. Even if it did, however, I find the above quoted passage from *Onjoko* is applicable.

(2) Did the RAD err by failing to consider the Applicant's perception of risk?

[44] The Applicants argue that the second prong of the IFA analysis has a subjective component, and that the RAD was required to consider the Applicants' perception of risk in the proposed IFA. The Applicants rely on *Karim v Canada (Citizenship and Immigration)*, 2015 FC

279 at para 26, in which Justice de Montigny found that the RPD failed to take into account the applicant's testimony about his emotional state in the assessment of IFA.

[45] I note Justice de Montigny's comment was made in the context of that case, after faulting the RPD for accepting the discrimination and tensions the applicants would face as Christians but did not "turn its mind to the problems encountered" by the principal applicant and his "permanent fear" for himself and his family.

[46] In this case, I find the RAD did turn its mind to the impact of relocation on the Applicants, and expressly considered the issues of language, indigeneship, employment, religion and travel, by taking into account the personal circumstances of the Applicants. The fact that the RAD did not specifically address the Applicants' state of mind, in the context of this case, did not render the Decision unreasonable.

IV. Conclusion

[47] The application for judicial review is dismissed.

[48] There is no question for certification.

JUDGMENT in IMM-1458-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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