

Federal Court



Cour fédérale

Date: 20220802

Docket: IMM-3834-21

Citation: 2022 FC 1159

Ottawa, Ontario, August 2, 2022

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

FRANCIS IGADWA KIHARANGWA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Francis Igadwa Kiharangwa, seeks judicial review of a decision of the Refugee Appeal Division (“RAD”), dated May 23, 2021, confirming the determination of the Refugee Protection Division (“RPD”) that the Applicant is neither a Convention refugee nor a person in need of protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“IRPA”).

[2] The Applicant fears persecution at the hands of unknown political rivals in Kenya based on his political profile and ethnicity. The RAD determined that the Applicant did not have a forward-looking risk.

[3] The Applicant submits that the RAD erred in failing to conduct a fulsome internal flight alternative (“IFA”) analysis and in failing to address his evidence and submissions.

[4] For the reasons that follow, I find that the RAD’s decision is reasonable. Accordingly, this application for judicial review is dismissed.

II. **Facts**

A. *The Applicant*

[5] The Applicant is a 50-year-old citizen of Kenya. The Applicant grew up in a political family and states that due to the family’s political activities, many of his family members experienced attacks and two of his brothers were killed.

[6] In January 2017, the Applicant ran as an independent candidate in the election for a Member of the County Assembly in the Lumakanda Ward. The Applicant claims he received death threats from his political opponents and was told to leave politics. The Applicant alleges that on May 15, 2017, a group of five people attacked him near his house.

[7] In August 2017, the Applicant lost the election. He claims that despite having lost the election, his political opponents sought retaliation against him for splitting the votes.

[8] In September 2017, the Applicant left Kenya and travelled to the United States, fearing his political opponents. His three children remained in Kenya with his sister.

[9] In February 2018, the Applicant married a US citizen. The couple separated in January 2019. The Applicant states that while he was in the US, his father received threats from unknown political groups, urging the Applicant to return home. In December 2018, the Applicant's father's property was burned down and destroyed. The Applicant attributes this attack to his political rivals.

[10] On April 14, 2019, the Applicant entered Canada and made a claim for refugee protection based on his risk of persecution in Kenya due to his political profile, his Luhya ethnicity and his Maragoli subtribe association.

B. *RPD Decision*

[11] In a decision dated March 3, 2020, the RPD rejected the Applicant's claim for refugee protection on the basis that he did not have a forward-looking risk. The RPD found that the Applicant did not have a prominent political profile and there was insufficient evidence to substantiate his allegations that his family had a history of being targeted by political opponents. The Applicant failed to present any evidence that he had faced past persecution or a forward-

looking risk due to his Luhya ethnicity. While the RPD raised an IFA in Nairobi and Mombasa at the hearing, it did not address this issue in its decision.

C. *Decision Under Review*

[12] In a decision dated May 23, 2021, the RAD confirmed the RPD's decision and found that the Applicant did not have a forward-looking risk.

[13] The RAD agreed with the RPD's conclusion that the Applicant does not have a highly visible or prominent political profile. There was insufficient evidence to establish a national political profile and risk, such that four years after a local election he would encounter a problem in Kenya upon his return. While the RAD accepted that the Applicant faced threats arising from his own personal involvement in politics, it found that the allegations surrounding his family's political involvement were not sufficiently credible or supported by the evidence. There was no evidence connecting the death of the Applicant's family members to their political profiles.

[14] The RAD further found that the Applicant's allegations that his children were being targeted in Nairobi by his political rivals were vague and speculative, and not supported by reliable or objective evidence. While the Applicant's sister provided an affidavit stating that unknown persons had threatened the children, forcing her to move twice, there were no documents on record indicating a change in address or police reports of the threats. Given the lack of sufficient credible evidence of ongoing interest in the Applicant, the RAD found that the Applicant did not face a forward-looking risk based on his political profile.

[15] With regard to the Applicant's ethnic profile and tribe association, the RAD found that the Applicant failed to provide sufficient credible evidence of discrimination amounting to persecution.

III. Issue and Standard of Review

[16] The sole issue in this application for judicial review is whether the RAD's decision is reasonable. I find that the applicable standard of review is that of reasonableness. The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("Vavilov") confirmed that reasonableness is the presumptive standard of review when reviewing the merits of an administrative decision and I do not find that the issue raised warrants a departure from this presumption (at paras 10, 16).

[17] 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).

[18] For a decision to be unreasonable, the applicant must establish 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; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 36).

IV. Analysis

A. *Internal Flight Alternative*

[19] The Applicant submits that the RAD sidestepped the requirement of identifying an IFA and conducting an IFA analysis. Specifically, the RAD erred in finding that the Applicant’s political profile was not prominent enough to put him at risk throughout Kenya. The Applicant argues that a mere statement that the Applicant is safe elsewhere in Kenya is an insufficient assessment, as the RAD failed to assess the Applicant’s risk in his hometown of Lumakanda.

[20] The Respondent contends that the determinative issue for both the RPD and the RAD was forward-looking risk, not the availability of an IFA. As such, the RAD was not required to conduct an IFA analysis. The Respondent asserts that the Applicant’s arguments are a mischaracterization of the RAD’s decision as a whole. The RAD concluded that the Applicant would not be at risk in his hometown and throughout Kenya, but the reference to persecution throughout Kenya was made in the context of assessing the Applicant’s claim of persecution.

[21] I agree with the Respondent. I do not find that the RAD was required to conduct an IFA analysis as it was not identified as a determinative issue before the RPD or the RAD (*Karim v Canada (Citizenship and Immigration)*, 2020 FC 566 at para 9). The Applicant's claim was based on his risk of persecution in Lumakanda, and the Applicant argues that the RAD erred in assessing his risk as being throughout Kenya, rather than in his hometown. I agree with the Respondent that this is a mischaracterization of the RAD's decision. The RAD accepted that the Applicant was involved in local politics and was attacked in May 2017, but found that the Applicant had failed to establish that his political profile put him at risk. Based on the evidence before the RAD, I find that the RAD reasonably concluded that while the Applicant may have had a subjective fear of local politicians in the ward where he ran in the 2017 elections, "there is insufficient credible evidence establishing that there is a risk to him from these unknown persons today". As such, it was reasonable of the RAD to find insufficient evidence to support the Applicant's claim of a forward-looking risk.

B. *Risk Assessment and the Applicant's Evidence*

[22] The Applicant submits that the RAD failed to assess the risk he faces as a perceived future political opponent or candidate from a minority ethnic group. The RAD erred by ignoring the Applicant's evidence and submissions regarding the risk he faces, and instead concluding that the Applicant did not intend to return to politics. The Applicant also submits that the RAD failed to consider the Applicant's circumstances in the context of the systemic and widespread presence of political violence in Kenya.

[23] The Respondent contends that the Applicant's submissions are an attempt to build up his claim as being something more than it is. A review of the RAD's decision and the Applicant's submissions on appeal clearly demonstrates that the RAD understood the Applicant's claim and appropriately assessed his allegations of persecution based on his political prominence and ethnicity. In doing so, the RAD concluded that there was insufficient credible evidence to establish a risk from his alleged agents of persecution today.

[24] I agree with the Respondent and find that the Applicant's arguments on this point are without merit. While the RAD stated that the Applicant had not expressed an intention to return to politics in the future, it also found that there was insufficient credible evidence of an ongoing interest in the Applicant. The Applicant does not point to any evidence that the RAD failed to consider that would support a different conclusion. The RAD acknowledged the Applicant's allegation that he had faced ethnic discrimination in the past, but reasonably found that the Applicant failed to provide sufficient credible evidence of discrimination amounting to persecution.

[25] Finally, the Applicant submits that the RAD erred in its failure to assess the risk he faces in the context of the country conditions in Kenya. The Applicant points to several passages from a report in the country condition documentation that outlines the existence of political violence based on ethnic strife in Kenyan politics. I do not find this evidence to be relevant. The RAD accepted that the Applicant faced attacks and threats from political rivals when he ran as a candidate in Lumakanda Ward. This was not in dispute. The determinative issue for the RAD was the lack of a forward-looking risk. While the Applicant established that he had faced

persecution in the past, evidence of past persecution is only an indicator of future persecution—it is not determinative (*Soltani v Canada (Citizenship and Immigration)*, 2021 FC 1135 at para 29; *Fernandopulle v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 91 at paras 23-25). I find it was reasonable of the RAD to conclude that the Applicant failed to establish this forward-looking risk with sufficient credible evidence.

V. **Conclusion**

[26] For the reasons above, I find the RAD's decision to be reasonable. I therefore dismiss this application for judicial review. No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-3834-21

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.
2. There is no question to certify.

“Shirzad A.”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3834-21

STYLE OF CAUSE: FRANCIS IGADWA KIHARANGWA v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: BY VIDEOCONFERENCE

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