Federal Court  Cour fédérale

Date: 20220812

Docket: IMM-1662-20

Citation: 2022 FC 1191

[ENGLISH TRANSLATION]

Ottawa, Ontario, August 12, 2022

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

KATERINE BOSEDE ONYEMALI
PRINCE DANIEL ONYEMALI
LISA AWULI ONYEMALI
EMMANUEL NKEMNELO ONYEMALI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] The applicant, Katerine Bosede Onyemali, and her three children born between 2003 and 2007 [the associate applicants] are citizens of Nigeria. Together, the applicants are seeking

judicial review of a decision by the Refugee Appeal Division [RAD] dated February 11, 2020 [the Decision]. In that decision, the RAD dismissed their appeal and confirmed the decision of the Refugee Protection Division [RPD] in which the RPD found that the applicants were neither Convention refugees nor persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] because of the existence of an internal flight alternative [IFA] in the cities of Port Harcourt, Ibadan, or Abuja, in Nigeria.

[2] The applicants claimed fear of persecution at the hands of family members of Famous Ossai Onyemali, the applicant's husband and father of the associate applicants, who insist that Ms. and Mr. Onyemali's daughter, Lisa Awilu, born in 2003, undergo female genital mutilation [FGM]. The applicants also claimed fear of spousal abuse by Mr. Onyemali and of Lisa Awuli's forced marriage.

[3] The RAD concluded that the determinative issue for the purposes of the appeal was whether there is an IFA.

[4] On this application for judicial review, the applicants argue that the RAD's decision is unreasonable and should be set aside. The applicants state that the RPD made the following reviewable errors: (1) the RAD was wrong in rejecting the new evidence submitted; (2) the RAD erred in finding that the applicants had an IFA in Nigeria; and (3) the RAD erred in upholding the RPD's finding that the applicant does not meet the definition of a Convention refugee. During the hearing, the applicants focused their arguments on the finding that the applicants had an IFA.

[5] For the reasons that follow, the application for judicial review is dismissed.

II. Standard of review

[6] Having reviewed the record, I agree with the parties that the issues raised by the applicants are reviewable on a standard of reasonableness.

[7] To be reasonable, a decision must be justified in relation to the facts and law that constrain the decision maker (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85). The applicants, the parties challenging the decision, bear the onus of demonstrating that the RAD decision is unreasonable (*Vavilov* at para 100). For the reviewing court to intervene, the challenging party must satisfy the reviewing court that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency", and that such alleged shortcomings or flaws "must be more than merely superficial or peripheral to the merits of the decision" (*Vavilov* at para 100). Reasonableness review is not a "line-by-line treasure hunt for error". The reviewing court must be satisfied the decision maker's reasoning "adds up" (*Vavilov* at paras 102, 104).

[8] I also note that the standard of review is no different with respect to the admissibility of new evidence before the RAD under subsection 110(4) of the IRPA (*Khelili v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 188 at para 14).

III. Analysis

A. *Admissibility of new evidence*

[9] The applicants raised the issue of the new evidence they attempted to submit to the RAD. The applicants stated that the RPD and RAD treated Ms. Onyemali as a vulnerable person, but did not declare it. The applicants stated that, considering the applicant's vulnerability and her psychological state, she could not normally have presented this evidence before the RPD. According to the applicants, the RAD should have considered these aspects of the record and accepted the evidence in question. Further, the applicants stated that had the RAD accepted this new evidence, it would have found that Mr. Onyemali had the ability and motivation to locate the applicants in the proposed IFA cities.

[10] The respondent replied that the RAD did not err in refusing to allow new evidence to be entered into the record. The respondent submitted that (1) new documents cannot be used to supplement deficient evidence before the RPD, and (2) Exhibit A-3 contains no new evidence.

[11] The RAD cited subsection 110(4) of the IRPA as relevant, and also the criteria in *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*] and *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 [*Raza*].

[12] Subsection 110(4) states:

Evidence that may be presented	**Éléments de preuve admissibles**
(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of	**(4)** Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le

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.	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.

[13] The Federal Court of Appeal clarified the requirements for new evidence in *Singh* and *Raza*. The Federal Court of Appeal recalled that "[i]t is clear that the explicit conditions referred to in subsection 110(4) must be met", and that these conditions "leave room for no discretion on the part of the RAD" (*Singh* at paragraphs 34–35). The Federal Court of Appeal also found that the implied criteria identified in *Raza*, namely credibility, relevance and novelty, also apply in the context of subsection 110(4) (*Singh* at paras 38, 49).

[14] In this case, the RAD provided a well-founded decision that demonstrates an analysis of the criteria in subsection 110(4) of the IRPA and the jurisprudence. The RAD looked at all three new documents and explained in detail why each exhibit was being excluded. Considering the RAD's analysis and the documents before it, I find that the applicants have failed to identify a reviewable error in the RAD's decision to reject the new evidence.

B. *Internal flight alternative*

[15] The applicants submitted that the RAD erred in finding possible IFAs.

[16] The test for the identification of an IFA, as stated by the Federal Court of Appeal, is summarized by Associate Chief Justice Gagné in *Jean Baptiste v Canada (Citizenship and Immigration)*, 2019 FC 1106:

> [20] To determine whether there is an IFA in the home country of a refugee protection claimant, the first question is whether "the circumstances in the part of the country to which the claimant could have fled are sufficiently secure to ensure that the appellant would be able to enjoy the basic and fundamental human rights". Next, the question is whether "conditions in that part of the country [are] such that it would not be unreasonable, in all the circumstances, for the claimant to seek refuge there".

[17] Indeed, it was up to the applicants to satisfy the RPD and the RAD, on a balance of probabilities, that there was no IFA or that the IFA was unreasonable in the circumstances (*Gallo Farias v Canada (Citizenship and Immigration)*, 2008 FC 1035 at para 34).

[18] The applicants stated that the RPD's questions regarding IFAs at the hearing were rather vague. The applicants submitted that the RAD should have been aware that the RPD had not elaborated on the reasonableness of the IFA and had not sufficiently considered Ms. Onyemali's mental health situation.

[19] The respondent submitted that there was insufficient evidence to conclude that Mr. Onyemali had the motivation and ability to locate them in the proposed IFAs and, therefore, the RAD did not err. The respondent noted that the applicants did not dispute before the RAD (1) that Mr. Onyemali's family would have neither the ability nor the motivation to locate them in the cities identified as an IFA; and (2) the RPD's conclusions on the second prong of the analysis that it was reasonable for the applicants, given their personal circumstances, to settle in the

identified IFAs. The respondent submitted that, based on *Abdulmaula v Canada (Citizenship and Immigration)*, 2017 FC 14 [*Abdulmaula*], the reasonableness of the RAD's decision cannot be challenged on an issue that was not before it.

[20] I agree with the respondent. Findings made by the RPD which were not challenged by the applicants on appeal may not form the basis of judicial review of the RAD's decision (*Akintola v Canada (Citizenship and Immigration)*, 2020 FC 971 at para 21; *Abdulmaula* at paras 13–16). The applicants did not challenge the RPD's finding that it was reasonable to expect that they would be able to relocate to the proposed IFA locations. Therefore, the applicants are not permitted to challenge it here on judicial review.

[21] The applicants argued that the RAD should have considered this point, even if it was not contested, as a new document had been included in the National Documentation Package [NDP] in November 2019 and the decision was rendered on February 11, 2020. Specifically, Tab 5.9 titled "NGA106362.E Nigeria: Whether women who head their own household, without male or family support, can obtain housing and employment in Abuja, Lagos, Ibadan, and Port Harcourt; government support services available to female-headed households" [Document 5.9 2019]. The applicants alleged that Document 5.9 2019 [TRANSLATION] "completely contradicts" what was previously in the NDP. The applicants argued that the RAD therefore erred in relying on the jurisprudential guide TB7-19851 [Guide] when it should have relied on Document 5.9 2019.

[22] For the following reasons, I do not agree that the RAD erred.

[23] First, the RAD did not base its analysis on the Guide. The only reference in the decision to the Guide is as follows: “Moreover, even though the RPD states in its reasons that it applied the jurisprudential guide with respect to refugee protection claimants who fear FGM in Nigeria, the RAD notes that the RPD conducted its own analysis as to whether there was a viable IFA for the appellants in Nigeria.”

[24] Second, the Guide was only revoked in April 2020, two months after the RAD’s decision.

[25] Third, the topics discussed in Document 5.9 2019, including the difficulties experienced by women running their own household, on which the applicants rely, are also found in the Guide and the document to which it refers entitled “NGA103907.E Nigeria: Whether women who head their own households, without male or family support, can obtain housing and employment in large northern cities, such as Kano, Maiduguri, and Kaduna, and southern cities, such as Lagos, Ibadan, Port Harcourt; government support services available to female-headed households” [Document 5.9 2013]. I do not agree that Document 5.9 2019 completely contradicts the Guide and what was previously in the NDP, as the applicants claim. The difficulties experienced by women running their own households were detailed in Document 5.9 2013 in the NDP. Had the applicants wished to dispute the reasonableness of the IFA, they should have done so before the RAD at the time. The RAD was not obliged to raise this issue on its own initiative.

C. *“Compelling reasons” for not returning to Nigeria*

[26] In their written submissions, the applicants submitted that the RAD should have conducted an analysis under subsection 108(4) of the IRPA because the applicant suffered an [TRANSLATION] “appalling” or “atrocious” trauma that she will suffer again if she returns to Nigeria where her husband lives.

[27] I am not persuaded that the RAD erred as the applicants alleged. The compelling reasons exception in subsection 108(4) of the IRPA was not raised by the applicants or their counsel before the RAD. The failure of an applicant to raise an issue before the RAD is fatal to the ability to raise this issue on judicial review (*Abdulmaula* at paras 13–16).

[28] In addition, the circumstances in which an assessment of compelling reasons must be conducted are absent in this case. This Court has confirmed that for subsection 108(4) of IRPA to apply, “the claimant would have once qualified as either a Convention refugee or a person in need of protection” (*Castillo Mendoza v Canada (Citizenship and Immigration)* 2010 FC 648 at paras 27–28*; Krishan v Canada (Citizenship and Immigration)*, 2018 FC 1203 at paras 76–77). The RAD’s decision is not based on a request by the Minister to determine the loss of refugee status under subsection 108(4) of the IRPA, nor on circumstances that have now disappeared and under which the applicants could have obtained refugee status. The RAD specifically explained that, in its view, the RPD did not question the existence of past domestic and family violence and “does not explicitly state in its decision that there is a nexus to the Convention”, but decided that the determinative issue was whether an IFA was viable.

D. *Ms. Onyemali’s mental health*

[29] During the hearing, time was devoted to a number of events that occurred after the RAD rendered its decision. In particular, the Vancouver IRB requested that Ms. Onyemali's counsel provide her with the decision in person given Ms. Onyemali's previous suicidal ideation, Ms. Onyemali's severe reaction to the decision, and the role that counsel had to play in managing this crisis.

[30] While I have great sympathy for Ms. Onyemali and her counsel, these events do not affect the reasonableness of the RAD's decision, which must be assessed under the test set out by the Supreme Court of Canada in *Vavilov*.

IV. Conclusion

[31] For the above reasons, this judicial review application is dismissed. The parties raised no questions for certification and I agree that none arise.

JUDGMENT in IMM-1662-20

THIS COURT'S JUDGMENT is as follows:

1. The applicants' application for judicial review is dismissed.
2. The style of cause is amended to have the Minister of Citizenship and Immigration named as the appropriate respondent.
3. There is no question for certification.

"Vanessa Rochester"
Judge

Certified true translation
Janna Balkwill

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1662-20
STYLE OF CAUSE:	KATERINE BOSEDE ONYEMALI ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD VIA VIDEOCONFERENCE
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