Federal Court  Cour fédérale

Date: 20221129

Docket: IMM-799-21

Citation: 2022 FC 1639

Ottawa, Ontario, November 29, 2022

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

KAYODE OLUMIDE OGUNGBILE
ABIMBOLA TEMITOPE OGUNGBILE
TOLULOPE DISNEY OGUNGBILE
OLUWATOFARATI DANIELLA AJIKE OGUNGBILE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants, Kayode Olumide Ogungbile, his wife Abimbola Temitope Ogungbile and their two children, who are citizens of Nigeria, seek judicial review of a decision by the Refugee Appeal Division [RAD] dated January 19, 2021, confirming a determination of the Refugee

Protection Division [RPD], which dismissed their claim for refugee protection. The determinative issue in both decisions was the existence of an internal flight alternative [IFA] in Port Harcourt. For the following reasons, I am dismissing their application for judicial review.

II. Background and underlying decisions

[2] Mr. Ogungbile fears certain Ogun chiefs and their followers after refusing to become a member of the Ogun fraternity of traditional worshippers and participate in their rituals; members of his paternal family were insisting that he do so on his fortieth birthday as he was the first-born male child of his family. After receiving a notice of his formal initiation into the fraternity, which was to take place in July 2017, Mr. and Ms. Ogungbile left for a two-week vacation in South Africa, at the end of which Mr. Ogungbile travelled to the United States while Ms. Ogungbile returned to Nigeria before joining her husband in the United States a short time later, along with the children. After being in the United States for several weeks and not claiming refugee protection, the family entered Canada on November 22, 2017, and sought refugee protection in this country.

[3] In its decision dated March 11, 2020, the RPD found that a viable IFA existed for the family in Port Harcourt, and it rejected their claim. On appeal before the RAD, the Ogungbile family presented no new evidence, and no oral hearing was held. As part of their submissions before the RAD, the Ogungbile family, amongst other arguments, challenged the RPD's application of the Jurisprudential Guide for Nigeria [JGN], arguing that the JGN was revoked soon after the RPD decision was rendered and that in any event, the JGN fettered the RPD's

discretion as the RPD failed to consider the personal circumstances of the Ogungbile family when applying it.

[4] The RAD found that the RPD did not err in its application of the JGN. The RAD noted that the Federal Court of Appeal, in *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 [*Canadian Association of Refugee Lawyers*], held that the JGN does not unlawfully fetter the discretion of Board members or improperly constrain their freedom to decide cases that may come before them. As stated by de Montigny JA at paragraph 88 of *Canadian Association of Refugee Lawyers*, the JGN "simply put claimants on notice that the current existing conditions seem to suggest certain conditions in a given country, without providing a definitive assessment of the facts and without preventing claimants and their counsel from distinguishing their particular circumstances". The RAD disagreed with the Ogungbile family's assertion that the JGN is not a relevant assessment tool when considering the viability of Port Harcourt as an IFA, concluding that the JGN was written in such a fashion as to set out a framework for analysis in cases where the existence of IFAs in major Nigerian cities is a potential determinative issue; the RAD found that the RPD did not extend the individual circumstances of the Ogungbile family's situation to other cases with blind reliance.

[5] With respect to the first prong of the IFA test, the Ogungbile family argued that the RPD did not properly analyze the nature of the agents of persecution, ignored evidence on the reach and power of cults in Nigeria and erred in applying the JGN and by not differentiating it on the facts. The RAD found that the RPD correctly noted that the Ogungbile family is fleeing non-state

actors and that the JGN supports various viable IFAs for those fleeing agents of persecution of that nature where it is not established that the agents of persecution have the reach and power to locate them everywhere in Nigeria. The RAD found that the RPD correctly noted that the objective evidence did not support the Ogungbile family's assertions that their agent of persecution had the capacity or the motivation to harm them in Port Harcourt.

[6] Regarding the second prong of the IFA test, the Ogungbile family argued that the RPD erred by failing to consider objective evidence supporting their contention that they would face discrimination in employment as Yoruba non-indigenes; that Mr. Ogungbile would have to continue to work as a travel agent, thus elevating his profile and risk; and that the family would be unable to purchase a home or find adequate housing on account of the high cost of living in Port Harcourt. Mr. Ogungbile also argued that even as English speakers, his family may not be understood everywhere in the city and that there is criminality and danger in Port Harcourt.

[7] The RAD found that the RPD had correctly considered the Ogungbile family's personal circumstances in assessing the reasonableness of the proposed IFA, and determined that there was no error in the RPD's application of the JGN. The RAD was not convinced that Mr. Ogungbile necessarily had to work as a travel agent as he was highly educated and had also held other employment, including employment in the oil and gas industry. The RAD acknowledged that indigeneship influences access to employment in the public sector, but stated that it would not affect Mr. and Ms. Ogungbile, who were historically employed in the private sector, and would not prevent them from accessing essential public services. The RAD found that the Ogungbile family had not met their onus of establishing that Port Harcourt was an

unreasonable IFA on account of financial challenges, had not demonstrated how or why they specifically would be at risk of being subjected to criminality or terrorism any more than any other Nigerian citizens, and had not shown how or why criminal groups such as the Niger Delta would be targeting them.

III. Issue and Standard of Review

[8] The sole issue to be determined in this application for judicial review is whether the RAD's decision was reasonable. The applicants concede that none of the exceptions to the presumptive standard of reasonableness apply in this case (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16-17, 23 [*Vavilov*]). 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).

IV. Analysis

[9] The Ogungbile family raise a series of issues in respect of the RAD decision, but ultimately assert that the RAD should have, of its own volition, addressed the COVID-19 pandemic as part of its assessment of the second prong of the IFA test in relation to Nigeria. The Ogungbile family point to an Immigration and Refugee Board of Canada [IRB] bulletin dated October 21, 2020, whereby the IRB was encouraging claimants to monitor updates on COVID-19 restrictions in Nigeria, as well as a document dated July 24, 2020, that was supposedly an administrative letter from the RAD to their present counsel, in an unrelated matter, inviting her to make further submissions addressing whether or not the global COVID-19

pandemic would have any impact on determining whether an IFA existed for her other clients in Nigeria. The Ogungbile family argue that the RAD was therefore fully aware of the COVID-19 situation and should have addressed it as part of its IFA assessment in its decision, which it did not.

[10] I cannot agree with the Ogungbile family. First of all, there is no evidence that their previous counsel did not receive a similar letter from the RAD enquiring whether he or she wished to make submissions on how, if at all, the COVID-19 pandemic would affect the IFA assessment; the affidavit of Mr. Ogungbile does not address the issue, and there is no affidavit from his previous counsel. It is possible that his previous counsel did receive such a letter and simply chose not to respond. What is certain is that the RPD decision was issued on March 11, 2020, just at the outset of the global pandemic, which was understandably not addressed in the RPD's decision; that this document, which was supposedly an administrative letter inviting further submissions from counsel on the topic was issued in July 2020; that the Ogungbile family's appeal before the RAD was perfected in August 2020; that the IRB bulletin was published in October 2020; and that the RAD decision was issued in January 2021.

[11] This document, which was supposedly an administrative letter sent to the Ogungbile family's present counsel regarding another one of her files, was simply an invitation, if she felt it was necessary, to file further submissions on how the pandemic could be relevant to the IFA assessment. In addition, the portion of the IRB bulletin to which the Ogungbile family referred me was simply a notice that most states in Nigeria had introduced, as was the case for most of the world, their own restrictions on movement within the territories. I accept that the RAD was

conscious of the pandemic that was taking place around the world; however, neither the administrative letter nor the IRB bulletin, in any way, shape or form, somehow creates an obligation on the part of the RAD to address the COVID-19 pandemic as an element in its assessment of the reasonableness of an IFA when the parties themselves have not raised it as an issue of concern.

[12] Here, at no point between the filing of their notice of appeal in March 2020 and the perfection of their appeal in August 2020 did the Ogungbile family raise before the RAD any concerns regarding the impact that COVID-19 may have had on the RPD's determination of a reasonable IFA in Nigeria. What the Ogungbile family are asserting before me is that although they may not have expressed any concerns regarding the impact of COVID-19 on the reasonableness of the IFA, the RAD should have done so *ex proprio motu*. There is simply no basis for such a proposition, and no support was provided for such a bald assertion. It is not the role of the RAD to address concerns relating to the reasonableness of an IFA when such concerns are not raised by applicants (*Adigun v Canada (Citizenship and Immigration)*, 2022 FC 649 at paras 36-38; *Gutierrez Molina v Canada (Citizenship and Immigration)*, 2021 FC 1404 at paras 25-26; *Hamid v Canada (Minister of Citizenship and Immigration)*, 2020 FC 145 at para 53).

[13] It may well be that previous counsel did not receive a letter similar to the one put into evidence by the Ogungbile family's present counsel. However, the fact remains that if the Ogungbile family intended to raise the impact of the pandemic as an *ex post facto* issue going to the reasonableness of the RPD's determination, they had ample time to do so prior to the RAD

rendering its decision; they did not, and I am not convinced that the RAD breached the principles of procedural fairness and natural justice by not considering the issue as part of its assessment of the reasonableness of the IFA.

[14] The Ogungbile family also raise the issue of whether the RAD properly assessed their argument in relation to the RPD's treatment of the JGN. They argue, as they did before the RAD, that the JGN was no longer relevant and should not have been applied given that it was subsequently revoked, and that in applying it, the RPD did not consider their personal circumstances. I cannot agree with the Ogungbile family. First, it was made clear in *Canadian Association of Refugee Lawyers* that the JGN did not unlawfully fetter the discretion of Board members nor improperly constrain their freedom to decide cases. In addition, there is no evidence that the RAD did not take into consideration the personal circumstances of the applicants; in fact, a simple reading of the decision demonstrates quite the opposite.

[15] As to the remaining issues, the applicants did not press before me that the analysis of the RAD in the determination of the two-prong test for an IFA was unreasonable. For my part, having reviewed the decision, I see nothing unreasonable in the RAD's findings on this issue.

V. Conclusion

[16] The application for judicial review is dismissed.

JUDGMENT in IMM-799-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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