Federal Court  Cour fédérale

Date: 20230316

Docket: IMM-2732-22

Citation: 2023 FC 362

Ottawa, Ontario, March 16, 2023

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

SYLVESTER OGHENEVWOKE AKPORE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] of a decision by the Refugee Appeal Division [RAD], dated February 25, 2022. To succeed the Applicant must establish that the RAD's conclusions regarding three Internal Flight Alternatives [IFAs] in Nigeria were unreasonable or that the RAD's consideration of his new evidence or of his section 96 claim was unreasonable.

[2] This application is dismissed for the following reasons.

II. Facts

A. *Basis of Claim*

[3] The Applicant, a citizen of Nigeria, worked as a project engineer with an oil company. The following assertions are from his amended narrative.

[4] The Applicant's late father was politically active in local government as the chairman of a political party until he was pushed out of the position for opposing the governorship candidate that would become governor of 2015. The Applicant's father joined a new political organisation. The father was threatened in this role, and killed at a party meeting in 2016. The Applicant believes the killing was politically motivated and it remains unsolved. The Applicant started to manage his father's properties, one of which was the site of crude oil discovery that his father managed, to prevent the land being seized due to his profile and previous political connections.

[5] In 2017, the Applicant was summoned by his clan leader (the king) and told to give up the land with crude oil deposits on order from the governor, hinting that he would meet the same fate as his father if he did not surrender rights to the land. The Applicant was later summoned again by the clan leader by phone, and his employer told him there was external pressure to have him fired. The Applicant continued to avoid the clan leader.

[6] In April 2017, men he recognized as being gang members directed by local politicians barricaded the entrance to his family home as he, his wife and children were returning home. They were armed and demanded documents for the land. The Applicant drove away and the men chased them, vandalizing his car. The Applicant went to police, who demanded a cash bribe – which he could not pay – to open a file. He was told by an officer that police were reluctant to get involved for political reasons.

[7] The Applicant rented a hotel for a few days. His wife and children returned to the family home a week after the incident, and the Applicant went to his uncle's house. He returned to work in May and his boss raised concerns about the pressure to fire the Applicant and danger he faced. The Applicant would sneak in and out of his family home. In June, a group of men, including three that attacked him in April, went to his workplace and assaulted him. His colleagues interfered and allowed him to escape. He took a bus elsewhere were he stayed with a friend.

[8] In July 2017, his wife called to say the gang members went to the house to find out his whereabouts, threatening to kidnap the two children. She told them where he was staying. The Applicant's friend advised him to leave the country, and he applied for a visa. He left his friend's house to stay with in-laws. The Applicant and his friend visited police, who asked for a bribe for police protection. The Applicant obtained a visa to enter the United States. The Applicant says his employer told him someone went to his office at the end of August 2017 looking for him and he continued to receive threatening phone calls.

[9] In October, he flew to the US. Upon arrival, he was told the border was closed to refugees and he would be deported. He arrived at the Canadian border in November and claimed asylum from political actors in Nigeria. He says his wife still receives threatening calls and has changed her number. She and their children moved to another city in 2018.

[10] On April 22, 2021, according to documents filed to the RAD on appeal, the Applicant's wife and daughter were attacked by gunmen and were hospitalized. This is a subject of new evidence application he filed with the RAD.

B. *Refugee Protection Division*

[11] The Refugee Protection Division [RPD] heard the claim on March 29, 2021. The panel decided on May 3, 2021 that the Applicant was not a Convention refugee or a person in need of protection, because he had three IFAs.

III. Decision under Review

[12] The RAD rejected most of the new evidence submitted on appeal, declined to hold an oral hearing and dismissed the appeal on February 25, 2022.

A. *New Evidence*

[13] The RAD applied subsections 110(4) and (6) of *IRPA*:

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.
…	…
Hearing	**Audience**
(6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)	**(6)** La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois:
(a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;	**a)** soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;
(b) that is central to the decision with respect to the refugee protection claim; and	**b)** sont essentiels pour la prise de la décision relative à la demande d'asile;
(c) that, if accepted, would justify allowing or rejecting the refugee protection claim.	**c)** à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas.

[14] The RAD did not admit evidence of an alleged attack against the Appellant's wife, which included an affidavit, a police diary extract, a medical report and photographs of the Appellant's wife and children in the hospital. The RAD rejected these documents because they referred to an

event that took place on April 22, 2021 – 11 days before the RPD's decision issued. The RAD found the Applicant had not explained when he learned about the event, or how he acquired the evidence. Because they refer to an incident that pre-dated the RPD decision, the RAD found it was unreasonable for him not to inform the RPD of this issue before his claim was rejected.

[15] The RAD did not accept news articles or a referral to a psychotherapist that pre-dated the RPD hearing and decision. Some of the articles were the same, but were published on different dates. Another article from Human Rights Watch relates to kidnappings in one of the IFAs, but was published before the RPD rejected the Applicant's claim. The RAD does not discuss the other documents, including the referral, news articles about violent events, and another news article about kidnappings across the country. The RAD only states: "I find that [a number of documents] either do not post-date the RPD rejection of the claim, are not new and all are not relevant as they relate to Delta State or Osun State and not the IFAs cities identified."

[16] The remaining documents included a Government of Canada travel advisory for Nigeria, which post-dated the RPD decision, was credible, but was not relevant, according to the RAD, because it did not identify any of the IFA cities as places to avoid all travel. The only two documents that were accepted and found to be new, credible and relevant, were articles about kidnapping, murder and lack of state protection in Nigeria from an online news source and Amnesty International.

[17] Because the new evidence did not raise credibility concerns, were not central to the decision or would not justify allowing or rejecting the claim, the RAD refused the request for an oral hearing.

B. *Sections 96 and 97 claims*

[18] The RAD upheld the RPD decision, stating:

> The RPD correctly determined that the Appellant's claim had no nexus to a Convention ground. Accordingly, the claim was assessed under section 97 of the IRPA. It is well-established that a higher-risk threshold exists for section 97 claims, which requires the risk be assessed on a "balance of probabilities". By contrast, claims under section 96 of the IRPA only require a "serious possibility" or a "reasonable chance" of persecution.

[19] The RAD went on to discuss the threshold for IFAs under section 97 claims ("danger of torture, or a risk to life or of cruel and unusual treatment or punishment" on a balance of probabilities), which is higher than the threshold for IFAs under section 96 claims ("serious possibility of persecution"), citing *Hamdan v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 643 at para 11.

C. *RAD's IFA Analysis*

[20] The RAD found the reasonableness of the three IFAs was the determinative issue.

[21] The RAD began the analysis by summarizing the RPD's findings and credibility concerns, which it accepted.

[22] The RAD concluded it was reasonable to expect the Applicant to forfeit his land to ensure his and his family's protection on return to Nigeria, citing *Sanchez v Canada (Citizenship and Immigration)*, 2007 FCA 99 [*Sanchez*] at paragraph 16 and *Malik v Canada (Citizenship and Immigration)*, 2019 FC 955 [*Malik*] at paragraph 29. On this point, I agree. The case law of this Court and the Federal Court of Appeal supports the reasonableness of requiring a claimant to relinquish rights to land before pursuing a claim for refugee protection. Where the agents of persecution would no longer have an interest in pursuing the Applicant if he relinquished the land, as here, the RAD reasonably found he would not be at risk in the proposed IFA regions: *Sanchez* at para 16; *Malik* at paras 19, 25-30.

[23] The RAD did not consider whether the agents of harm had the means to locate the Applicant in the IFAs, because it concluded they would have no motivation to do so after he gives up the property in dispute. The RAD concluded the Applicant would not be a target for any political involvement of his father. The RAD also concluded that arguments related to terrorist activities and violent incidents from particular groups in the IFAs were not relevant to the Applicant's claim of personalized risk.

[24] The RAD also maintained adverse credibility findings regarding the threats to his family since their relocation because it found the Applicant made no arguments to address the RPD's concerns, except to rely on new evidence that was not admitted.

[25] The RAD upheld the RPD's finding that it was not unreasonable for the Applicant to relocate to the IFAs, rejecting the Applicant's argument that "high unemployment, corruption,

influence peddling, political and economical turmoil, discrimination towards non-indigenous and the lack of safety" made the IFA locations unreasonable. The RAD concluded that the two new pieces of evidence accepted did not support the Applicant's argument; nor did the RAD accept arguments that the Applicant could not obtain psychological support, and he and his wife would be unable to find employment. The RAD found the Applicant and his family had demonstrated their ability to adapt to new environments, and that the oil and gas industry would provide suitable employment, enabling him to find housing and medical services. No evidence supported the Applicant's arguments regarding housing, employment and services in the other two IFAs. Finally, the RAD preferred the National Documentation Package evidence concerning the right to non-discrimination of non-indigenes and the availability of mental health services in Nigerian cities over the documents submitted by the Applicant about the lack of state protection from violence in the country and the absence of any evidence of the Applicant's mental illness or prescriptions being unavailable in the IFAs.

IV. Issues and Standard of Review

[26] The Applicant raises the following issues:

1. Did the RAD err in determining that the Applicant's claim has no nexus to a Convention ground?
2. Did the RAD err in finding that the Applicant was not credible?
3. Did the RAD err in rejecting evidence that met the requirements of the statutory rule and test for the admission of new evidence?
4. Did the RAD err in evaluating whether the Applicant has a viable IFA in Abuja, Port Harcourt or Ibadan?

V. Analysis

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

[28] In this connection, in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 [*Vavilov*], the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] 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). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*,

> at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
>
> [Emphasis added]

[29] Furthermore, *Vavilov* makes it abundantly clear the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances". The Supreme Court of Canada instructs:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
>
> [Emphasis added]

[30] Likewise, the Federal Court of Appeal recently held in *Doyle v Canada (Attorney General)*, 2021 FCA 237 [*Doyle*] that the role of this Court is not to reweigh and reassess the evidence:

> [3] In doing that, the Federal Court was quite right. Under this legislative scheme, the administrative decision-maker, here the Director, alone considers the evidence, decides on issues of admissibility and weight, assesses whether inferences should be drawn, and makes a decision. In conducting reasonableness review of the Director's decision, the reviewing court, here the Federal Court, can interfere only where the Director has committed fundamental errors in fact-finding that undermine the acceptability

> of the decision. Reweighing and second-guessing the evidence is no part of its role. Sticking to its role, the Federal Court did not find any fundamental errors.
>
> [4] On appeal, in essence, the appellant invites us in his written and oral submissions to reweigh and second-guess the evidence. We decline the invitation.

A. *Did the RAD err in determining that the Applicant's claim has no nexus to a Convention ground?*

[31] The Applicant argues the RAD should have considered whether he is perceived by his persecutors to hold the same political opinions as his father, regardless of whether or not he actually does (*Canada (Citizenship and Immigration) v A25*, 2014 FC 4 at para 17). The Applicant's testimony should have been presumed credible, he submits, which would have established the nexus to his Convention claim (citing *Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593; *Armson v Canada (Minister of Employment & Immigration)*, [1989] FCJ No 800 (FCA) (no pinpoints added). He argues the RPD and RAD both erred in not considering the claim under section 96 *IRPA*.

[32] According to the Applicant, the documents rejected by the RAD would have established the nexus of his claim to the Convention ground. The Applicant also argues that under the mixed motive doctrine, the political motivations of the agents of harm are sufficient to establish the nexus to political Convention grounds. The land dispute is one of the consequences of being targeted for his attributed political opinion and the RPD erred in evaluating the risks as mutually exclusive, he submits (citing *Canada (Citizenship and Immigration) v B344*, 2013 FC 447 at para 37; *Shahiraj v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 453 at paras 16-20). The RAD should have also assessed the Applicant's subjective fear submits the Applicant.

[33] I also note the RAD statement regarding the Convention claim: “The RPD correctly determined that the Appellant’s claim had no nexus to a Convention ground. Accordingly, the claim was assessed under section 97 of the *IRPA*.” I do not take from this that the section 96 claim was not assessed, simply that the RAD found the RPD’s analysis correct and adopted it as its own which in my view is permissible. In addition I note the RPD did go on to analyse the section 97 claim.

[34] In any event, these concerns have no merit because jurisprudence establishes neither a section 96 nor 97 analysis is required in this proceeding because the finding of an IFA is fatal to either or both claims. See *Singh v Canada (Citizenship and Immigration)*, 2023 FC 64 at paras 16-18) per Justice Walker:

> [18] I agree with the Respondent that the existence of a viable IFA is fatal to a claim under section 96 or 97 (*Ambroise v Canada (Citizenship and Immigration)*, 2021 FC 62 at para 39). The RAD’s determination that the Haryana police would not and could not track the Applicant to the IFA responds to sections 96 and 97. Stated otherwise, as the Applicant’s agents of persecution do not have the ability to locate the Applicant in Bengaluru, he would not be subject to more than a mere possibility of persecution or to a section 97 risk or harm. As a result, I find no reviewable error in the RAD’s treatment of the Applicant’s section 96 nexus claim.

[35] The Appellant in his Memorandum also raised the mixed motive doctrine which allows the RPD to find a nexus where there are nexus and non-nexus bases for alleged wrongful treatment per section 96. However, I will not consider this issue because the Applicant did not raise the mixed motive doctrine argument at the RAD. Therefore he cannot raise it on judicial review: *Bakare v Canada (Citizenship and Immigration)*, 2021 FC 967 at paragraph 26. Issues

must be framed in the appeal to the RAD. Judicial review is not the place for serial relitigation with new issues (or new facts) added to the mix as the case moves from one tribunal to another.

B. *Did the RAD err in finding that the Applicant was not credible?*

[36] The Applicant submits the RAD should not have adopted the RPD's findings on the credibility. It says it should have reached its own conclusions. I agree the RAD adopted certain credibility assessments made by the RPD, but not all. While the RAD's Reasons show it agreed with aspects of the RPD decision, and adopted certain findings, the Reasons do not show the RAD adopted the RPD's credibility findings with respect to (1) the Applicant's father's political activities, and (2) the movement of the land documents following the first attack by the gang at the Applicant's home. In the case at bar, the RAD referenced the RPD Decision, and reviewed the record, the audio tape of the hearing, and the Applicant's submissions. The RAD not only referenced the RPD's findings, but expanded upon them in some instances. I am not persuaded the RAD simply paid lip service to independent review.

[37] More importantly, the fact the RAD came to the same conclusions as the RPD on credibility, or otherwise, is not an indication that no independent review was conducted. It is simply a conclusion that upon its own review the RPD was correct in that respect. See for example *Anel v Canada (Citizenship and Immigration)*, 2016 FC 759 per Manson J at paragraph 26:

> [26] The fact that the RAD came to the same conclusions as the RPD is not an indication that no independent review was conducted. The RAD referenced not only the RPD decision, but also reviewed the record, including the audio tape of the hearing and the Applicant's submissions. The RAD's analysis not only

> reviews the RPD reasoning but expands upon the RPD's findings and factual bases for its reasons. I find that the RAD undertook an independent analysis, as instructed by the Federal Court of Appeal, and did not simply pay lip service to the notion of independent review.

[38] And see *Jean Baptise v Canada (Citizenship and Immigration)*, 2019 FC 1106 per Gagné ACJ at paragraph 29:

> [29] The fact that the RAD agreed with the RPD's findings in no way suggests that it might not have carried out its own analysis of the evidence (*Irivbogbe v Canada (Citizenship and Immigration)*, 2016 FC 710 at para 39; *Anel v Canada (Citizenship and Immigration)*, 2016 FC 759 at paras 24–26; *Guo v Canada (Citizenship and Immigration)*, 2017 FC 317 at para 15). Rather, in my view, it confirms that the RAD applied the correctness standard in its analysis of the RPD's findings.

[39] More generally, in this connection the Applicant also asks the Court to reweigh and reassess evidence and inferences in this case, which with respect it declines to do given *Vavilov* and *Doyle*, noted above.

[40] I find no reviewable error in relation to the various credibility assessments.

C. *Did the RAD err in rejecting evidence that met the requirements of the statutory rule and test for the admission of new evidence?*

[41] The Applicant argues the new evidence he filed should have been admitted because it met the test for admissibility. He argues the documents related to the April 22, 2021 attack on his wife and daughter should be admitted because they became available after the RPD hearing, although this was 11 days before the RPD rejected the claim. These documents contradict one of

the credibility findings, related to the ongoing threat against his family, which favors their acceptance (citing *Ismailov v Canada (Citizenship and Immigration)*, 2015 FC 967 at para 53). The Applicant also argues it is unreasonable to expect a claimant to gather and file new evidence in such a short timeline.

[42] I disagree. This issue was comprehensively considered and rejected by the RAD, as follows and in respect of which there is no reviewable error:

> [12] Documents A), B), C) and D) all relate to an alleged attack against the Appellant's wife and daughter, which took place on April 22, 2021, as sworn to in an affidavit dated April 26, 2021, therefore, the event and documents A) , B) and presumably D) predate the RPD rejection of the claim and the Appellant has not offered any reasons as to why this event was not brought to the attention of the RPD through an application for post-hearing submissions as its reasons were only signed on May 3, 2021. Document C) post-dates the RPD rejection of his claim but refers to the incident on April 22, 2021, which predates the RPD rejection of May 3, 2021. The Appellant does not explain when he acquired the knowledge of his wife and daughter's attack or when the documents were sent to his attention. I therefore cannot find that documents A), B), C) and D) would not reasonably have been available to him and an incident such as an alleged attack on his family before the RPD rendered its rejection of the claim was not reasonable for him to have expected to have presented these documents or alerted the RPD to the incident at the time of the rejection of the claim. I reject documents A), B), C), D).

[43] The Applicant argues the remaining documents, namely news articles, NGO articles, and a confirmation of the Applicant's referral to psychotherapy, were unreasonably rejected. Again the Applicant invites the Court to reweigh and reassess the record and inferences, and again I decline that invitation.

D. *Did the RAD err in evaluating whether the Applicant has a viable IFA?*

[44] This is the determinative issue in this judicial review.

[45] The Applicant argues the RAD applied the wrong test in its IFA assessment, by considering only section 97 (citing *Adjei v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 680 (FCA); *Ponniah v Canada (Minister of Employment & Immigration)*, [1991] FCJ No 359). He also submits the credibility findings and rejection of new evidence contributed to an erroneous analysis of the motivation and means of the agents of harm.

[46] Similarly, the Applicant submits the RAD did not properly assess the reasonableness of his relocation to the IFA, in light of his psychological health needs, which would have been established by the referral document had it not been rejected.

[47] In my view this aspect of the application cannot succeed without the new evidence being accepted and credibility issues resolved otherwise than as found by both the RPD and RAD. Given the rejection of the new evidence, except to the limited extend granted by the RAD, and the lack of unreasonableness regarding credibility findings, I am unable to find unreasonableness in the findings in relation to the determinations of the IFAs by the RAD.

VI. Conclusion

[48] Given the above, this application for judicial review will be dismissed.

VII. Certified Question

[49] Neither party proposed a question of general importance and none arises.

JUDGMENT in IMM-2732-22

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, no question of general importance is certified and there is no Order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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