

Federal Court



Cour fédérale

Date: 20230725

Docket: IMM-699-22

Citation: 2023 FC 1016

Ottawa, Ontario, July 25, 2023

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

**Kikelomo Isiwat OGEDENGBE
Mahdiya Ojuolape OGEDENGBE
Abdul Majid Akolade OGEDENGBE
Marthin Iredele OGEDENGBE**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants are a mother, Kikelomo Isiwat Ogedengbe, and her children who are citizens of Nigeria, except for her youngest child who is a citizen of the United States of America. Kikelomo Isiwat Ogedengbe, the Principal Applicant [PA] and her spouse divorced

while they were in the United States, before coming to Canada, but they reconciled and are living together here with their children.

[2] Together with the PA's spouse, the Applicants sought refugee protection in Canada asserting fear of the PA's in-laws who are members of a traditional clan in Nigeria, as well as a fear of persecution because of the PA's spouse's sexual orientation.

[3] The Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] denied the family's claim, finding they were not Convention refugees nor persons in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001 c 27.

[4] On appeal, the Refugee Appeal Division [RAD] of the IRB granted refugee protection to the PA's spouse on the basis of his sexual orientation but found that the rest of the family would not face persecution should they return to Nigeria without him and rejected their claims [Decision]. The RAD also found that the youngest child [Minor Applicant] had not established he would face harm in the United States.

[5] The Applicants seek judicial review of the Decision. Contrary to the Applicants' submissions, I am not convinced that the Decision is unreasonable or procedurally unfair.

[6] I therefore dismiss this judicial review application, for the reasons provided below.

II. Issues and Standard of Review

[7] Having considered the parties' written and oral submissions, the evidence of record and the applicable jurisprudence, I find that this matter raises the following issues:

- A. *Did the RAD err by finding the Applicants do not have a well-founded fear of persecution in Nigeria?*
- B. *Did the RAD breach procedural fairness by failing to give the Applicants an opportunity to address a new issue?*
- C. *Did the RAD err by failing to provide reasons for its findings regarding the Minor Applicant?*

[8] A reasonable decision is one that exhibits the hallmarks of justification, transparency and intelligibility, and is justified in the context of the applicable factual and legal constraints:

Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 [Vavilov] at para 99.

The party challenging an administrative decision has the burden of showing that it is unreasonable: *Vavilov*, above at para 100.

[9] Questions of procedural fairness attract a correctness-like standard of review: *Benchery v Canada (Citizenship and Immigration)*, 2020 FC 217 at paras 8-9; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Vavilov*, above at para 77. The focus of the reviewing court is whether the process was fair in the circumstances: *Chaudhry v Canada (Citizenship and Immigration)*, 2019 FC 520 at para 24.

III. Analysis

- A. *Did the RAD err by finding the Applicants do not have a well-founded fear of persecution in Nigeria?*

[10] The Applicants have not convinced me that the Decision is based on an illogical or irrational chain of analysis or that there is a fatal flaw in the RAD's overarching logic: *Vavilov*, above at paras 85 and 102.

[11] Contrary to the Applicants' arguments, I am satisfied the RAD reasonably determined that the Applicants did not establish a well-founded fear of persecution based on either the sexual orientation of the PA's spouse or the clan-related threats.

[12] Regarding the sexual orientation claim, the RAD explained that the objective documentary evidence did not establish the Applicants' assertion that they would face forward-looking risk in Nigeria as immediate family members of a bisexual man when he was not in Nigeria himself. In light of the evidence before the RAD, its findings were reasonable.

[13] Moreover, the RAD is presumed to have considered all evidence before it and is not required to refer to every piece of evidence: *Kandha v Canada (Citizenship and Immigration)*, 2016 FC 430 at para 16. The Applicants have not persuaded me that the RAD overlooked any key or contradictory evidence, and it is not this Court's role to reweigh the evidence that was before the RAD: *Vavilov*, above at para 125.

[14] Regarding the clan-related threats, the RAD reasonably explained, in my view, why it did not address this claim. The RAD explained that the Applicants' testimony was that they had learned to live with the family clan-related issues, and they did not actively pursue this claim

before the RPD, despite being provided the opportunity to do so when questioned by counsel at the RPD.

[15] For example, when asked by the RPD member what he meant when he testified that he would not be able to live a good life in Nigeria, the PA's spouse answered that he wouldn't be able to live as a bisexual person because he will be in hiding. When the member asked if there was any other harm he feared for himself and his family, he answered "It's finished now."

Although the spouse clarified that their fear started with the family clan-related issues, his sexual orientation and being caught making out with a friend caused him to fear for his life and the safety of his family, as well as to leave Nigeria.

[16] Looking holistically at the testimony of both the PA and her spouse before the RPD, I agree with the Respondent that the RAD reasonably found there was a lack of evidence establishing the Applicants' objective fear, for both claims: *Fodor v Canada (Citizenship and Immigration)*, 2020 FC 218 at para 18; *Doka v Canada (Citizenship and Immigration)*, 2004 FC 449 at para 38.

[17] I also note the Applicants allege before this Court that the PA's father was targeted and injured because of her husband's sexual orientation and that the RAD failed to consider this evidence of a similarly situated person in Nigeria. The Applicants' argument before the RAD, however, was that the PA's father was targeted by the clan, not because of the spouse's sexual orientation. Again, it was open to the Applicants to clarify and pursue this aspect of their claims before the RPD when they were provided the opportunity to do so.

B. *Did the RAD breach procedural fairness by failing to give the Applicants an opportunity to address a new issue?*

[18] As I explain below, I am not persuaded that the RAD raised a new issue without giving the Applicants an opportunity to respond.

[19] When the RAD confirms a decision of the RPD “that cannot reasonably be said to stem from the issues as framed by the parties, the RAD must give the affected parties notice and an opportunity to make submissions”: *Xu v Canada (Citizenship and Immigration)*, 2019 FC 639 at para 33.

[20] I agree with the Respondent that by finding the Minor Applicant had not established he faces persecution or harm in the United States, the RAD simply confirmed this was the case; there was no evidence put forward by the Applicants to base a claim of persecution against the United States. On a holistic review, it is evident the Decision does not rest on this finding nor is it central to the RAD’s overall conclusions. As a result, I am not persuaded that the RAD raised a new issue nor was the RAD required to provide the Applicants with notice of the same.

C. *Did the RAD err by failing to provide reasons for its findings regarding the Minor Applicant?*

[21] In addition, I am not convinced the RAD erred in not assessing more fully whether the Minor Applicant faced risk in the United States.

[22] Applicants in a refugee claim have the burden of proof and are expected to put their best foot forward: *Abdullahi v Canada (Citizenship and Immigration)*, 2016 FC 260 at para 14.

[23] The record confirms that the Minor Applicant's claim is not based on fear regarding the United States. The Applicants now cannot fault the RAD for not assessing whether the Minor Applicant faces a risk of harm or persecution in the United States when it was not put forward by the Applicants before the tribunal below: *Odia v Canada (Citizenship and Immigration)*, 2018 FC 363 at para 8; *Bin Jamil v Canada (Citizenship and Immigration)*, 2022 FC 1791 at para 63.

[24] The Applicants in my view are speculating before this Court that the family would be separated and the Minor Applicant would be left to the foster care system in the United States. There is no evidence on record to support this argument. More to the point, the Applicants did not raise the issue before the tribunals below, and therefore, it is improperly before the Court.

IV. Conclusion

[25] For the above reasons, I therefore dismiss the Applicants' judicial review application.

[26] Neither party proposed a serious question of general importance for certification and none arises in the circumstances.

JUDGMENT in IMM-699-22

THIS COURT'S JUDGMENT is that:

1. The Applicants' judicial review application is dismissed.
2. There is no question for certification.

"Janet M. Fuhrer"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-699-22

STYLE OF CAUSE: KIKELOMO ISIWAT OGEDENGBE, MAHDIYA
OJUOLAPE OGEDENGBE, ABDUL MAJID
AKOLADE OGEDENGBE, MARTHIN IREDELE
OGEDENGBE v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

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