Federal Court  Cour fédérale

Date: 20240104

Docket: IMM-12886-22

Citation: 2024 FC 18

Ottawa, Ontario, January 4, 2024

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

TUNBOSUN MICHAEL BAYODE
OLUWAKEMI ORIYOMI BAYODE
ABIMIFOLUWA OLUWAPEMISIRE ALEXANDRA BAYODE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants constitute a family of Nigerian Nationals who seek to be recognized as refugees. They have not been successful before the Refugee Protection Division [RPD] nor before the Refugee Appeal Division [RAD]. They now bring a judicial review application against the RAD's determination, having been granted leave pursuant to s 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[2] The scope of the judicial review application is significantly reduced from the RPD determination. That is because the RAD disagreed with the RPD about a number of findings made by the RPD concerning the credibility of the principal Applicant, Mr. Tunbosun Michael Bayode, and his wife, Mrs. Oluwakemi Oriyomi Bayode. The RPD findings on the credibility of the two principal Applicants were numerous. The RAD determinations on credibility were not challenged on judicial review by the Minister. It follows that the issue of the credibility of these two Applicants is not before the Court on judicial review and there is no reason to consider it any further.

[3] The RPD had also found that the Applicants had a viable Internal Flight Alternative [IFA] in three Nigerian cities: Abuya, Benin City and Ibadan. Here again, the RAD disagreed somewhat with the RPD. The RAD found that Benin City would not be an objectively reasonable place to relocate for various reasons. There exist cultural and linguistic differences in Benin City which were seen to make the relocation unreasonable. More importantly perhaps, there is in the region where Benin City is located armed and oil-related violence which, if considered with the linguistic and cultural differences, would make relocation there unreasonable. That conclusion was not challenged either by the Minister on judicial review.

[4] As a result, only Abuya and Ibadan constitute places where an appropriate IFA was found to exist by the RAD. Thus, the sole issue before this Court is whether that conclusion constitutes a decision that meets the requirement that it be reasonable.

I. The facts

[5] The principal Applicant is now 44 years old. The other Applicants are Mrs. Oluwakemi Oriyomi Bayode and their child. The spouses were married in 2013.

[6] The Applicants lived in the city of Lagos, a large metropolitan area in Nigeria. It was alleged that, on September 10, 2016, two men were sent from the village where the principal Applicant came from. They were sent, it was alleged, to warn that a ritual had to be performed on the child in order to confirm the paternity of the principal Applicant. The message included that there was no room for negotiation. An attempt to report the incident to the police proved to be unsuccessful, as we are told the police refused to interfere in a "traditional matter".

[7] The Applicants decided to flee, first through various villages, and then to the United States where they arrived on April 12, 2017; they came to Canada 16 months later, on August 21, 2018, to seek refugee protection.

[8] As part of some further background, it should be noted that allegations about the role that was to be played by the principal Applicant in his tribe, following the death of his father in 2001, were made a part of the narrative. Mr. Bayode was expected to replace his father as the traditional priest. Instead of accepting that role, he fled his village and converted to Christianity. He refused to be involved in the traditions of his tribe. The Applicants contend that they cannot return to Nigeria because family and tribe members are planning to kill them. There is also the fear that they may want to perform some rituals on the father and the child.

II. The RAD decision

[9] As already pointed out, the only issue left is whether the Applicants have an IFA in their country of nationality. As has been repeated many times, before seeking to find refuge in a different country, one must attempt to find refuge in one's own country of nationality (*Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589, p 592-593 [*Thirunavukkarasu*]. Nigeria is a country of some 220 million inhabitants where, the RAD found, there were IFAs: that was the determinative issue.

[10] The Applicants' contention was that the whole country is dangerous and that they could be kidnapped. The RAD found that the Applicants had not established that family or tribe members had the means or the motivation to trace the Applicants in other identified locations in Nigeria. Between 2001 and 2013, that is between the death of the principal Applicant's father and his marriage, there was no issue involving him and his tribe. It is only in September 2016 that two men came and threatened him. That was the only such event. While the passage of time alone may not in itself establish a lack of interest by agents of persecution, it remains that this was the sole visit over a span of 15 years: the RAD found no pattern of serious threats or acts of intimidation or violence. The evidence did not establish "that the agents of persecution would have an interest to pursue them" (RAD decision, para 44).

[11] The Applicants were not successful either in claiming that it would be objectively unreasonable, as being unduly harsh, to relocate in Nigeria. The RAD expressed the view that was not established through specific information or sources that there are concerns about safety,

economic crises or cultural identity. In the places identified as IFAs, English is spoken by a large segment of the population while Christianity is the religion of close to half the people who have made those cities their home. These cities would be a good match. There is no objective reason to conclude that relocation would be unreasonable. As a result, the appeal from the RPD decision was dismissed.

III. Argument and analysis

[12] The standard of review of an administrative decision where an IFA has been found to exist is reasonableness. There is considerable, and as far as I have been able to ascertain, unanimous jurisprudence which reached that conclusion. It follows that the Applicants' burden is to satisfy the reviewing court, on a balance of probabilities, that the decision under review lacks the hallmarks of reasonableness, that is justification, transparency and intelligibility, "and whether it [the decision] is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653, para 99 [*Vavilov*]).

[13] The Court has carefully reviewed the written submissions offered on behalf of the Applicants and listened to the oral arguments. Counsel for the Applicants made a valiant effort to suggest that the jurisprudence of this Court leads to the conclusion that the RAD decision is unreasonable. The argument according to which there are other RAD decisions which suggest that there is a lack of consistency between various RAD decisions, which would render the decision under review unreasonable, was also presented. I have concluded that it has not been shown that the RAD decision lacks the required reasonableness.

[14] I begin with the latter argument. It has no merit.

[15] In effect, the Applicants are confronted with the facts and the law in this case as it relates to IFAs. The facts are especially important. The very foundation to their argument is that where an administrative decision maker departs from longstanding practices or established internal authority, that must be explained. They rely for that proposition on paragraphs 129-132 of *Vavilov*.

[16] There is no doubt that general consistency of administrative decisions is a value to be cherished. As the Supreme Court notes at paragraph 129 of *Vavilov*, "(t)hose affected by administrative decisions are entitled to expect that like cases will generally be treated alike and that outcomes will not depend merely on the identity of the individual decision maker …". But, first, in order for the proposition to hold, one has to show longstanding practices or established internal authority or, at the very least, that like cases have not been treated alike. That takes you back to the facts. That has not been achieved.

[17] This Court has noted before that "immigration cases, like any administrative decision, are heavily fact dependent" and "arise out of uniquely personal circumstances" (*Sami-Ullah v Canada (Citizenship and Immigration)*, 2022 FC 1525, at para 30). The Applicants have not established longstanding practices or internal authority from which this decision could be said to have departed. Instead, they seek to find in other RAD cases elements which are presented as favourable to a particular applicant in the particular circumstances of that particular case. For

instance, the Applicants rely on four different RAD decisions from which they pull a few words in support of paragraph 44 in their Memorandum of Fact and Law:

> 44. For instance, the RAD has previously noted that where the agent of persecution in Nigeria is motivated by cultural factors, and had previously tracked the Applicant down to another town in Nigeria, there would be no viable IFA in Nigeria. This would especially be the case where the agent of persecution "claims power and influence extending to youth, chiefs and traditional rulers, and police, all nationwide." In this regard, "powerful people connected to shrines are also" "well-connected to organized crime, corrupt police, smugglers and other sources of power in Nigeria." Consequently, "people working for shrines can be responsible for killing or harming those who offend the shrine."

The very kind of influence and power alluded to in this paragraph, which could help justify an outcome of having the means to locate someone, in a given country, was not even present in this case. That kind of influence has not been established on the facts of this case. These are just not cases that are alike as an essential feature in those cases is not reproduced in the case at bar. The claims of power and influence nationwide, or connections with organized crime or corrupt police which would suggest means to locate, were simply absent in this case.

[18] Similarly and more precisely, agents of persecution who are said to have political influence and connections in the police and politics, it is suggested, would permit them to locate the Applicants. The Applicants quote from a RAD decision at their paragraph 47: "The RAD concluded "that given the uncle's prominent role in society, he would have access to resources, both financially and through connections with government agencies, that would result in the [Applicants] being located in other regions in Nigeria", especially as his "interaction with the police already speaks of his influence." " The problem is that there is no evidence of such

“prominent role in society”, or the existence of resources including connections with government agencies in the case before the Court. To put it bluntly, that kind of RAD jurisprudence that does not relate to the facts of a case is less than helpful.

[19] Not only is there no evidence of longstanding practices or internal authority that could stem from such recitation, but the difference between the cases is not only one of degree but also one of kind. The features of these other RAD cases are not present in the case at bar. These cases are of no assistance to the Applicants as they are based on a different set of circumstances and facts.

[20] The Applicants, in the same vein, argue that the jurisprudence of this Court does somehow show that the RAD decision is unreasonable. Again, what is presented is a collection of cases without any precise reference to the decision under review.

[21] The burden on the Applicants was to show that the decision under review was not reasonable. It is not sufficient to throw cases against the wall in the hope that they will stick, or to leave to the reviewing court the task of establishing somehow the connection. The connection of the dots on the page must be done by those who suggest some connection (*Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431).

[22] The difficulty encountered by the Applicants is that they refer to a number of decisions in this Court in search of some relevance to the case at hand. There was not an attempt either in their memorandum of fact and law or during the hearing of the application to connect the facts of

this case with case law to establish some possible precedential value. A collection of cases without an articulation of how they apply to the facts and findings by the RAD is just that: a collection of cases.

[23] The Applicants relied more prominently on the case of *Gomez Dominguez v Canada (Citizenship and Immigration)*, 2020 FC 1098 [*Gomez Dominguez*], in their factum and at the hearing of this case, for the proposition that the RAD applied the wrong burden of proof on the Applicants. There is no merit to this proposition.

[24] Here, the RAD determined that the agents of persecution were not shown as having the means and motivation to find and harm the Applicants. Thus, they would not be at risk if they relocated in some areas of the country. Looking for some argument that the RAD was mistaken, the Applicants look for support to the case of *Gomez Dominguez* where our Court sought to explain the difference between the burden of proof, the balance of probabilities, and the existence of a serious possibility of persecution at the IFA site. If there exists the serious possibility of persecution in the location that could serve as an IFA, that would defeat the existence of an adequate IFA. The two concepts, the burden of proof and the serious possibility of persecution, must not be confused or amalgamated. The facts, and in this case they are the facts that help establish means and motivation, must be proven on a balance of probabilities, and those proven facts may lead to the conclusion that there is a serious possibility of persecution at the IFA location. The onus is on the Applicants to prove facts on a balance of probabilities, the standard of proof generally applicable in civil cases (*Canada (Attorney General) v Fairmont*

Hotels Inc, 2016 SCC 56, [2016] 2 SCR 720). Indeed, the evidence will require that it be sufficiently clear, convincing and cogent to meet the burden.

[25] It is rather obvious, it seems to me, that if there is no, or not sufficient, evidence of means and motivation to find and locate persons who are said to flee persecution in their neck of the woods, there can hardly be a serious possibility of risk.

[26] That is the basis on which the appeal before the RAD was determined. The panel did not amalgamate the two concepts. There was no confusion. Paragraph 41 of the RAD decision appears to be unassailable in that the RAD makes the clear difference between the burden to find the facts and the serious possibility of persecution. It is the means and motivation that have not been proven on a balance of probabilities which leads to the conclusion that there is no serious risk of persecution:

> [41] I find that the Appellants failed to establish that on a balance of probabilities, the agents of persecution would have the means and motivation to find and harm them, such that they would face the serious possibility of persecution in the proposed IFAs.

That made the RAD articulate at paragraph 44 of its reasons why it did not find means and motivation on the part of the agents of persecution: “I do not find the number and seriousness of threats or actions against them, or the situations alleged, demonstrate that the agents of persecution would have the means or motivation to find and harm them in the proposed IFA.”

[27] Instead of addressing the finding made by the RAD in order to demonstrate it lacked reasonableness, the Applicants, as with their reference to RAD cases to argue that this RAD panel departed from longstanding practice or established internal authority, embarked on a recital

of cases of dubious relevance to what had actually been decided by the RAD. The issue in the case at hand was lack of evidence of means, the ability to find the Applicants in a country of 220 million people, and the motivation to locate them. These facts had not been established by the Applicants on a balance of probabilities: it was for the Applicants to establish that this was not a reasonable outcome.

[28] The collection of cases in search of a connection with the case at hand does not demonstrate that the decision is unreasonable, on a balance of probabilities, which is the burden on the Applicants (*Vavilov*, para 100). That the Applicants would disagree with findings of fact is to be understood. But disagreement does not translate into unreasonableness. The reviewing court is not a court of first view. It does not connect the dots. The reviewing court takes a posture of respect and operates on the basis of the principle of restraint (*Vavilov*, paras 13-14). It is for an applicant to convince a reviewing court of the unreasonableness of an administrative decision. The collection of cases in search of some connection with the facts of this case did not result in a cogent and persuasive argument without an articulation of what that connection may be.

[29] During the hearing of this case, the Court pointed out to counsel for the Applicants that another case he was particularly relying on at that time, *Engenlbers v Canada (Citizenship and Immigration)*, 2022 FC 1545, did not have any resemblance with the facts found by the RAD in the case at hand. Obviously, if there is to be any precedential value in decided cases, the facts must at the very least connect somewhat. The same can be said of *Asotun v Canada (Citizenship and Immigration)*, 2022 FC 907, and the other cases alluded to by the Applicants. The other cases referred to in the factum that were not even raised in oral argument are even more removed

from the facts of this case. I have reviewed each of these cases: they stand for propositions relevant to the particular facts of that case. Without a proper connection to the facts of the instant case, they are of little value since the burden is to show that the decision was unreasonable, that is that "the reviewing court must be satisfied 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" (*Vavilov*, para 100).

[30] There is another fundamental problem with the approach taken by the Applicants on judicial review. As pointed out by counsel for the Respondent, the rulings by other RAD panels, if they had any relevance, were never raised before the panel hearing this appeal. Indeed, the same is true of the decisions of this Court invoked in this judicial review. Indeed the application for judicial review is limited to the RAD decision having been made in a perverse or capricious manner or without regard to the material before it. That calls for a review of the facts and findings, such review being absent in this case.

[31] I have reviewed the submissions made to the RAD, including of course the submissions on the availability of IFAs. Most of the cases cited before this Court were not brought to the attention of the RAD. More importantly, however, the cases referred to in the submissions to the RAD were never connected to the facts of the case before this Court.

[32] At best, the approach taken by the Applicants is to suggest rather than demonstrate shortcomings or flaws that could not be either central or significant when considered with what was actually decided by the RAD in this case. As already indicated, the starting point for the

Applicants had to be what was effectively decided by the RAD, to identify shortcomings that will satisfy a reviewing court that they are not merely superficial or peripheral to the merits of the decision. The assistance of case law would be relevant in support of the argument, not the other way around. That demonstration is not made where reference is to cases where facts and circumstances are different, without connecting the dots. I repeat. The RAD found that the facts establishing that agents of persecution had the means and motivation, in the circumstances of this case, to find and harm them was not present (RAD decision, paras 41 and 44). The RAD continued by reviewing the facts presented to the RPD by the Applicants, only to conclude that they had failed their burden. The mere reference to a collection of cases before the RAD or this Court, without a proper connection to the facts of this case, does not show that the decision under review has sufficiently serious shortcomings to conclude that it is unreasonable. The reasoning remains coherent and the finding is reasonable in light of the factual and legal constraints. The evidence before the decision maker about the means and motivation of possible agents of persecution was limited: the burden to show that that existed in this case was not discharged by the Applicants.

[33] The Applicants go on to seek to tackle the other way an IFA may not be adequate. The law on IFAs was established to a large extent in three Federal Court of Appeal cases: *Rasaratnam v Canada (Minister of Employment and Immigration) (CA)*, [1992] 1 FC 706 [*Rasaratnam*]; *Thirunavukkarasu*; and *Ranganathan v Canada (Minister of Citizenship and Immigration) (CA)*, [2000] 2 FC 164 [*Ranganathan*]. According to that binding case law, the onus is on one who claims to be a refugee to show that there is a serious possibility of persecution, including in the area which has been raised as affording an IFA. In the words of the

Court of Appeal in *Thirunavukkarasu*, "claimants must prove on a balance of probabilities that there is a serious possibility that they will be subject to persecution in their country" (p. 595). A claimant who would be able to convince the decision maker that agents of persecution have the means and the motivation to seek to trace the claimant throughout their country of nationality would defeat the allegation that there is an IFA if that results in a serious possibility of persecution. As found earlier, that prong has not been satisfied by the Applicants in their attempt to convince that the IFAs are not adequate.

[34] In *Rasaratnam*, the Court of Appeal had also concluded that a claimant could establish that there are no adequate IFAs if it was shown, on a balance of probabilities, that it would be unreasonable for the refugee claimant to seek refuge in that location:

> In my opinion, in finding the IFA, the Board was required to be satisfied, on a balance of probabilities, that there was no serious possibility of the appellant being persecuted in Colombo and that, in all the circumstances including circumstances particular to him, conditions in Colombo were such that it would not be unreasonable for the appellant to seek refuge there.
>
> (*Rasaratnam*, p. 711)

Again, a claimant who, on a balance of probabilities, satisfied the decision maker that it would be unduly harsh to expect to move to another part of the country before seeking international refugee protection would defeat the allegation that there exists an IFA.

[35] That so-called "second prong" was also raised by the Applicants in this case. After quoting a portion of one paragraph from *Thirunavukkarasu*, they contended that going to an IFA removed from family and friends would make it unreasonable (Memorandum of Fact and Law,

para 49). Here is the part of one paragraph taken from page 598 of *Thirunavukkarasu* which was quoted by counsel for the Applicants:

> An IFA cannot be speculative or theoretical only; it must be a realistic, attainable option. Essentially, this means that the alternative place of safety must be realistically accessible to the claimant. Any barriers to getting there should be reasonably surmountable. The claimant cannot be required to encounter great physical danger or to undergo undue hardship in travelling there or in staying there. For example, claimants should not be required to cross battle lines where fighting is going on at great risk to their lives in order to reach a place of safety. Similarly, claimants should not be compelled to hide out in an isolated region of their country, like a cave in the mountains, or in a desert or a jungle, if those are the only areas of internal safety available.

However, the paragraph did not end with the word "available". It continued with two additional sentences, followed by another paragraph. They provide the fuller finding by the Court of Appeal:

> … But neither is it enough for refugee claimants to say that they do not like the weather in a safe area, <u>or that they have no friends or relatives there, or that they may not be able to find suitable work there. If it is objectively reasonable in these latter cases to live in these places, without fear of persecution, then IFA exists and the claimant is not a refugee.</u>
>
> In conclusion, it is not a matter of a claimant's convenience or the attractiveness of the IFA, but whether one should be expected to make do in that location, before travelling half-way around the world to seek a safe haven, in another country. Thus, the objective standard of reasonableness which I have suggested for an IFA is the one that best conforms to the definition of Convention refugee. That definition requires claimants to be unable or unwilling by reason of fear of persecution to claim the protection of their home country in any part of that country. The prerequisites of that definition can only be met if it is not reasonable for the claimant to seek and obtain safety from persecution elsewhere in the country.
>
> (my emphasis)

[36] These two paragraphs, together with two more, were quoted in their entirety in *Ranganathan* in support of the Court of Appeal's conclusion:

> [15] We read the decision of Linden J.A. for this Court as setting up a very high threshold for the unreasonableness test. It requires nothing less than the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to a safe area. In addition, it requires actual and concrete evidence of such conditions. The absence of relatives in a safe place, whether taken alone or in conjunction with other factors, can only amount to such condition if it meets that threshold, that is to say if it establishes that, as a result, a claimant's life or safety would be jeopardized. This is in sharp contrast with undue hardship resulting from loss of employment, loss of status, reduction in quality of life, loss of aspirations, loss of beloved ones and frustration of one's wishes and expectations.
>
> (my emphasis)

[37] On the front that it would not be reasonable to relocate in two large Nigerian cities, the so-called second prong, the Applicants spoke also of insecurity and the economic crisis together with the fact that they would be joining a cultural minority in the proposed IFAs. The RAD found that their young ages, their education and work experience, "and the absence of evidence of other reasons that would make the proposed IFAs of [Blank] unduly harsh" (RAD decision, para 49) made the identified locations reasonable IFAs as per the test devised by the Court of Appeal. None of the circumstances raised by the Applicants rises to the required level called for by the Court of Appeal, such that this Court could find the RAD decision unreasonable. The Applicants have not discharged their burden. I add parenthetically that the absence of relatives and friends can hardly be raised in view of the principal Applicant's allegation that he was targeted by his family and clan members for death.

[38] The very high threshold required under the second prong was never attained according to the RAD. It has not been shown that this is unreasonable. Accordingly, the Applicants were unable to demonstrate neither of the two prongs of the test for an IFA in Nigeria could defeat the allegation of the existence of an adequate IFA. It was not demonstrated to the court of review that the conclusion reached by the RAD lacked in reasonableness.

IV. Conclusion

[39] It follows that the judicial review application failed. There is no serious question of general importance that arises from this case.

JUDGMENT in IMM-12886-22

THIS COURT'S JUDGMENT is the following:

1. The judicial review application is dismissed.

2. There is no serious question of general importance that is stated.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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