Federal Court  Cour fédérale

Date: 20220603

Docket: IMM-2283-21

Citation: 2022 FC 814

Ottawa, Ontario, June 3, 2022

PRESENT: Mr. Justice McHaffie

BETWEEN:

CHUKWUNONSO AUGUSTINE IWEKAEZE AND ONYINYECHUKWU FRANCISCA IWEKAEZE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Chukwunonso Augustine Iwekaeze and Onyinyechukwu Francisca Iwekaeze sought Canada's protection through a Pre-Removal Risk Assessment [PRRA]. They claim that if they return to Nigeria, they will be at risk from agents of the Nigerian "Directorate of State Security" [DSS]. Mr. Iwekaeze alleges the DSS detained him three times and continues to search for him

because his academic research had put him in contact with Biafran separatist groups and the DSS views him as an advisor to one of those groups.

[2] A Senior Immigration Officer refused the PRRA application, finding Mr. Iwekaeze's unsworn narrative statement, which was the only evidence of both his involvement with the separatist groups and the DSS incidents, insufficient to establish a risk of persecution or other harm under section 96 or 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The Iwekaezes now seek judicial review of that refusal, claiming the Officer unreasonably required them to file corroborative evidence, and unfairly made adverse credibility determinations without conducting an oral hearing.

[3] I conclude the Officer's decision was reasonable and fair. The Officer's reasons detailed the corroborative evidence they expected would be available and why Mr. Iwekaeze's statement was insufficient without such evidence. The decision was transparent, intelligible, and justified, and did not offend this Court's jurisprudence regarding corroborative evidence, insufficiency, and credibility. While the absence of corroborative evidence may be a matter that goes to a witness's credibility, it may also go to the sufficiency of the evidence presented by an applicant without raising credibility concerns. The Officer's findings in this case were sufficiency findings and not veiled credibility findings, and no oral hearing was required.

[4] The application for judicial review is therefore dismissed.

II. Issues and Standard of Review

[5] This application for judicial review raises two issues:

A. Did the Officer err in concluding the evidence was insufficient to establish the Iwekaezes' claim for protection?

B. Did the Officer err in reaching their conclusion without convening an oral hearing by making veiled credibility findings?

[6] The first of these issues goes to the merits of the decision and is reviewable on the reasonableness standard: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25. A reasonable decision is one that is transparent, intelligible and justified in relation to the factual and legal constraints on the decision maker: *Vavilov* at paras 15, 85, 99–101.

[7] The second issue goes to the procedure to be followed before the PRRA application is decided and not to the merits of the PRRA application. The Iwekaezes submit the issue is therefore one of procedural fairness and that the correctness standard applies, citing *Suntharalingam v Canada (Citizenship and Immigration)*, 2015 FC 1025 at para 48. The Minister, on the other hand, submits this issue should be reviewed on the reasonableness standard, since it turns on the interpretation and application of paragraph 113(*b*) of the *IRPA* and section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*]: *Garces Canaga v Canada (Citizenship and Immigration)*, 2020 FC 749 at paras 20–23; *Hare v*

Canada (Citizenship and Immigration), 2020 FC 763 at para 11. These provisions read as follows:

Consideration of application	**Examen de la demande**
113 Consideration of an application for protection shall be as follows:	**113** Il est disposé de la demande comme il suit :
[…]	[…]
(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;	**b)** une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;

Hearing — prescribed factors	**Facteurs pour la tenue d'une audience**
167 For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:	**167** Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :
(a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	**a)** l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;
(b) whether the evidence is central to the decision with respect to the application for protection; and	**b)** l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;

(c) whether the evidence, if accepted, would justify allowing the application for protection.	**c)** la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

[8] As a general rule, procedural fairness issues are reviewed by asking whether the procedure is fair having regard to all the circumstances, an approach sometimes referred to as correctness, but better viewed as engaging no standard of review at all: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54. Nonetheless, as Justice Diner of this Court has pointed out, this Court has diverged on the standard of review applicable when assessing whether a PRRA officer erred in not holding a hearing, with some cases adopting a reasonableness standard and others applying correctness: *Jystina v Canada (Citizenship and Immigration)*, 2020 FC 912 at para 19, citing *Garces Canaga* at para 22, *Hare* at para 11, *Allushi v Canada (Citizenship and Immigration)*, 2020 FC 722 at para 17, and *FGH v Canada (Citizenship and Immigration)*, 2020 FC 54 at para 17; *AB v Canada (Citizenship and Immigration)*, 2020 FC 498 at para 69; *Diallo v Canada (Citizenship and Immigration)*, 2019 FC 1324 at paras 14–15; see also Justice Rochester's thoughtful discussion of this jurisprudence in *Balogh v Canada (Citizenship and Immigration)*, 2022 FC 447 at paras 11–21, issued shortly after the hearing in this matter.

[9] In my view, and with respect for my colleagues who take a different view, procedural fairness issues remain matters to be reviewed outside the standard of review analysis, even where aspects of the applicable procedure are dictated by statute. The Supreme Court of Canada took this approach in *Khela*, where the disclosure provisions at issue were set out by statute, and in *Moreau-Bérubé*, where the issue was whether the process conformed with procedural fairness,

including legislated procedural requirements: *Mission Institution v Khela*, 2014 SCC 24 at paras 79–85; *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 at paras 74–81. In each case, the fact that there were legislated procedural provisions that had to be interpreted and/or applied did not take the issue outside the procedural fairness framework.

[10] The Federal Court of Appeal also adopted this approach in *Canadian Pacific*. There, the issue was the Canadian Transportation Agency's application of a stay power that was set out in regulations, in the context of a statutory time limit on decisions: *Canadian Pacific* at paras 22, 81–85. The Court of Appeal, citing *Khela* and *Moreau-Bérubé*, confirmed that a procedural fairness approach applied: *Canadian Pacific* at paras 34–56. In doing so, Justice Rennie noted that "[p]rocedural review and substantive review serve different objectives in administrative law": *Canadian Pacific* at para 55.

[11] This analysis is not, in my view, affected by *Vavilov*, which addressed substantive review on the merits and not procedural review. Justice Rennie underscored that *Khela* "did not subsume or collapse a discrete doctrine of administrative law, the law of procedural fairness, into the standard of review applicable to substantive review": *Canadian Pacific* at para 52. In my view, the same can be said of *Vavilov*. I note that *Vavilov*'s confirmation that the reasonableness standard applies to a tribunal's statutory interpretations cannot justify a different approach to procedural fairness based on whether the procedural issue arises at common law or under statute, since *Vavilov* equally instructs that reasonableness applies to a tribunal's application of the common law: *Vavilov* at paras 111–115.

[12] Within the procedural fairness approach, deference may be given to a tribunal in its procedural choices: *Canadian Pacific* at paras 41–46. This is also true for any findings of fact that are relevant to the procedural issues. However, this does not change the standard of review as a general matter: *Canadian Pacific* at paras 41–46.

[13] I make two further observations. First, when a legislature dictates aspects of the procedure by statute, as it has through paragraph 113(*b*) of the *IRPA* and section 167 of the *IRPR*, it has effectively given the administrative decision maker *less* procedural discretion by dictating aspects of the applicable process. It seems counterintuitive for the Court to give the decision maker *more* deference as a result. Second, this Court has to assess the same question at issue in this case—whether the decision maker made veiled credibility findings and should therefore have given the applicants an opportunity to be heard on the issue—in other immigration contexts, notably in visa applications. In such contexts, the Court routinely considers the matter one of procedural fairness reviewable on the correctness or "fairness" standard: see, *e.g.*, *Roopchan v Canada (Citizenship and Immigration)*, 2021 FC 1342 at paras 4–5, 12–27; *Adewunmi v Canada (Citizenship and Immigration)*, 2021 FC 1186 at paras 12, 24–26; *Opakunbi v Canada (Citizenship and Immigration)*, 2021 FC 943 at paras 6–14; *Al Aridi v Canada (Citizenship and Immigration)*, 2019 FC 381 at paras 15–16, 29–30. Again, it seems counterintuitive to apply a different standard to the same question simply because the rule against veiled credibility findings arises from a statutory hearing requirement and not a common law one.

[14] I therefore conclude the issue should be approached as a matter of procedural fairness, following the approach in cases such as *Allushi* and *FGH*. In other words, I will assess whether the requirements of fairness, as shaped by paragraph 113(*b*) of the *IRPA* and section 167 of the *IRPR*, required the Officer to hold an oral hearing, or at least consider the section 167 factors, because they made veiled credibility findings in the guise of sufficiency findings. Given my conclusion that the Officer did not err, it follows that the result would be the same even if the reasonableness standard were applied.

III. Analysis

A. *The Officer's Conclusion that the Evidence was Insufficient was not Unreasonable*

(1) The PRRA application and its refusal

[15] The Iwekaezes' PRRA application was based on the assertion that they would be at risk from agents of Nigerian state security, the DSS. I pause to note that Mr. Iwekaeze called the DSS the "Directorate of State Security." The Officer found no reference to that name in public searches, but rather to a "Department of State Services" that is also known as the "State Security Service." Nothing turns on the name, and I will simply use the initials DSS that both Mr. Iwekaeze and the Officer used.

[16] In support of their PRRA application, the Iwekaezes filed an unsworn declaration from Mr. Iwekaeze. He states that DSS agents detained and questioned him three times, including a weeklong detention in March 2019. The DSS suspected him of being an advisor to a Biafran separatist group, the Indigenous People of Biafra [IPOB], after his academic research led him to

meet with members of IPOB as well as the Movement for the Actualization of the Sovereign State of Biafra [MASSOB]. After the March 2019 detention, DSS officers came to the Iwekaezes' home while Mr. Iwekaeze was away, terrorizing Ms. Iwekaeze and demanding that he report to their office when he returned. The couple fled to Canada in July 2019. In November 2019, Mr. Iwekaeze received news from relatives and a business partner in Nigeria that the DSS had come to his home and business again leaving messages for him to attend their office.

[17] In addition to Mr. Iwekaeze's declaration, the Iwekaezes filed medical documents regarding the birth of their son and information regarding their immigration history. They also put forward country condition documents regarding political violence by Nigerian security agents, the persecution of MASSOB and IPOB members, and political corruption. However, the only evidence filed relating to the specific allegations regarding the DSS's treatment of Mr. Iwekaeze was his declaration.

[18] The Officer concluded Mr. Iwekaeze's unsworn narrative had "little probative value and is not sufficiently corroborated by reasonably available supplementary evidence." The Officer noted that the Iwekaezes' PRRA application was filed in March 2020, and that additional submissions were filed in October, giving the Iwekaezes a significant amount of time to obtain supporting documents. The Officer found that certain pieces of supporting evidence should be reasonably forthcoming, such as witness statements from Ms. Iwekaeze, or from the business partner and relatives referred to in Mr. Iwekaeze's declaration. They also noted there was no documentary support for Mr. Iwekaeze's assertions about his academic work, said to have put

him at risk, his employment with a state government organization, or the interviews held with the DSS. The Officer also noted that information about the visit from the DSS in November 2019 was based on hearsay from unclear sources and with no supporting statements.

[19] The Officer referred to the country condition evidence, accepting that there was corruption in Nigeria and the repression of political dissidents, including some members of IPOB and MASSOB. However, the Officer concluded Mr. Iwekaeze's statements were "of insufficient probative value to establish, on a balance of probabilities, his perceived association with any organization opposed to the Nigerian government" or Mr. Iwekaeze's treatment at the hands of the DSS. While there was evidence regarding Nigeria's treatment of political dissidents, there was insufficient probative evidence to connect Mr. Iwekaeze to such risks. The PRRA application was therefore refused.

(2) The refusal was reasonable

[20] The Iwekaezes argue the Officer essentially rejected Mr. Iwekaeze's narrative because it was not corroborated. Relying on Justice Teitelbaum's decision in *Ahortor*, they argue it is unreasonable to reject an applicant's evidence as not credible simply because they have not filed corroborative evidence: *Ahortor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 705 (TD) at para 45, citing *Attakora v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 444 (CA).

[21] The Minister responds with reference to *Seyoboka*, *Zdraviak*, and *II*, arguing that evidence from an applicant with a personal interest in the matter requires corroboration if it is to

have probative value: *Seyoboka v Canada (Citizenship and Immigration)*, 2016 FC 514 at para 36; *Zdraviak v Canada (Citizenship and Immigration)*, 2017 FC 305 at paras 15–18; *II v Canada (Citizenship and Immigration)*, 2009 FC 892 at para 20; each applying *Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 at para 27.

[22] I agree with the Minister that the principle outlined in *Ferguson* applies. An applicant for a PRRA has the onus to establish their case and it is up to them to put their "best foot forward" to meet this onus: *Ferguson* at para 22; *Ikeji v Canada (Citizenship and Immigration)*, 2016 FC 1422 at para 47; *Nhengu v Canada (Citizenship and Immigration)*, 2018 FC 913 at para 6. It is reasonable for an officer reviewing a PRRA application to conclude that an applicant has not met their onus where their allegations of risk are supported only by their own statements, in circumstances where corroborative evidence would be expected and the applicant has not acceptably explained its absence.

[23] In this case, the Officer provided thorough reasons explaining why they expected corroborative evidence would be available, what corroborative evidence they expected would be available, and why Mr. Iwekaeze's declaration was insufficient to meet the onus without corroboration. This included the fact that Mr. Iwekaeze could only give hearsay evidence with respect to the DSS's ongoing interest in him as evidenced by their visit in November 2019, as well as Mr. Iwekaeze's numerous references to unnamed friends and relatives, and a named business partner, each of whom might have provided supportive evidence but did not do so. The Officer considered the factual context, including the length of time in which the Iwekaezes could have obtained evidence, and the absence of any explanation for not providing the evidence. Their

reasons meet the requirements of transparency, intelligibility and justification, and conform to the legal constraints imposed by this Court's jurisprudence: *Vavilov* at paras 15, 85, 99–101.

[24] The Iwekaezes argue it was unreasonable for the Officer to rely on the period of time between the filing of their PRRA application in March 2020 and their submissions in October 2020 without considering the circumstances of the COVID-19 pandemic, when it was "almost impossible to obtain or convey any documents or evidence since everything was postponed or closed in Nigeria." However, despite filing additional submissions and evidence in October 2020, after Immigration, Refugees and Citizenship Canada had extended the time for submissions owing to the pandemic, the Iwekaezes did not give the Officer any indication that they were unable to obtain documents or evidence from Nigeria. Without having put forward such an explanation for the absence of corroborative evidence, I cannot conclude it is unreasonable for the Officer not to have speculated about the reasons for the lack of evidence.

[25] The Iwekaezes also argue that their narrative was in fact corroborated by evidence in the form of the country condition evidence, and that that corroboration was not considered by the Officer. However, the Officer did consider that evidence, concluding that while it confirmed the existence of corruption and repression of dissidents, it did not establish a link between that evidence and the Iwekaezes' allegations, nor establish as fact the events leading to their departure from Nigeria. These were reasonable conclusions.

B. *The Officer Did Not Make Veiled Credibility Findings*

[26] PRRA applications are typically heard and decided on the written materials filed by the applicant. As reproduced above, paragraph 113(*b*) of the *IRPA* provides that a "hearing," understood in context to mean an oral hearing, may be held if the Minister is of the opinion that one is required based on the factors in section 167 of the *IRPR*, namely whether there is evidence that raises a serious issue of credibility that is central to the decision and potentially determinative.

[27] The result, effectively, is that where a PRRA officer makes no credibility findings, no oral hearing will generally be required, but that where they make credibility findings, consideration must be given to whether an oral hearing should be conducted. This context has led applicants and the Court to raise procedural fairness concerns where a PRRA officer appears to have made adverse credibility assessments, but has not described them as such, typically using the language of sufficiency of evidence: see, *e.g.*, *Liban v Canada (Citizenship and Immigration)*, 2008 FC 1252 at paras 12–14; *Diallo* at para 20. This Court has confirmed that a PRRA officer's finding that evidence is insufficient may be a justifiable insufficiency finding, or may be a veiled credibility finding: *Herman v Canada (Citizenship and Immigration)*, 2010 FC 629 at para 17; *Ferguson* at para 26. Distinguishing between the two can be difficult, and the choice of words is not determinative: *Gao v Canada (Citizenship and Immigration)*, 2014 FC 59 at para 32.

[28] In the current case, the Officer's conclusion that Mr. Iwekaeze's evidence was insufficient was largely based on the absence of supporting documentation or other corroborative evidence. In some contexts, the absence of corroborative evidence when such evidence would be reasonably expected can lead a trier of fact to draw adverse credibility findings. This often arises in the context of refugee hearings by the Refugee Protection Division: see, *e.g.*, *Luo v Canada (Citizenship and Immigration)*, 2019 FC 823 at paras 18–22; *Senadheerage v Canada (Citizenship and Immigration)*, 2020 FC 968 at paras 21–36. However, the fact that an absence of corroboration can potentially lead to adverse credibility findings does not mean that all findings based on an absence of corroboration are credibility findings: *Ferguson* at para 27; *Gao* at paras 29–32, 44–46; *Haji v Canada (Citizenship and Immigration*), 2018 FC 474 at paras 20–22. The assessment depends on the substance of the PRRA officer's analysis as expressed in their reasons for decision.

[29] In the current case, the Officer's decision referred to the corroborative evidence that they would expect to be available, the time the Iwekaezes had to obtain that evidence, and the hearsay nature of some of Mr. Iwekaeze's statements. Based on a review of the decision as a whole in the context of the evidence put forward, I conclude that the Officer's assessment that the evidence was insufficient was simply that, and not a veiled credibility finding disguised as a sufficiency finding. The procedural requirements set out in the *IRPA* and the *IRPR* therefore did not require an oral hearing to be held and it was not unfair for the Officer not to have conducted one.

IV. Conclusion

[30] The application for judicial review is therefore dismissed. Neither party proposed a question for certification and I agree that none arises in the matter.

JUDGMENT IN IMM-2283-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2283-21
STYLE OF CAUSE:	CHUKWUNONSO AUGUSTINE IWEKAEZE ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	MARCH 22, 2022
JUDGMENT AND REASONS:	MCHAFFIE J.
DATED:	JUNE 3, 2022

APPEARANCES:

Allen Chao-Ho Chang	FOR THE APPLICANTS
Idorenyin Udoh-Orok	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Dov Maierovitz Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT