Federal Court  Cour fédérale

Date: 20220907

Docket: IMM-6042-21

Citation: 2022 FC 1264

Ottawa, Ontario, September 7, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

LUKMON OWOLABI SHOYEBO
RODEEYAH MONISOLA SHOYEBO
AISHA MOSUNMOLA SHOYEBO
RAFIAT AYOBAMI SABIU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by the Refugee Appeal Division [RAD], dated August 18, 2021, dismissing the Applicants' appeal and confirming the decision by the Refugee Protection Division [RPD], which found that the Applicants were not Convention

refugees nor persons in need of protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

II. Facts

[2] The Applicants are a family of Nigerian descent. The Principal Applicant [PA] is named first. He appears alongside his spouse, who is the Co-Applicant [CA], and two daughters. They are all citizens of Nigeria. Their youngest daughter is also a citizen of the United States (U.S.) by birth. The PA is the designated representative (DR) to represent the two minor Applicants.

[3] The family claims refugee protection because they fear persecution from a powerful political figure in the All Progressive Congress [APC] and a chief in the Ogboni cult, due to the PA's political opinion. They also allegedly fear an elected APC member of the Federal House of Representatives for the Mushin II constituency who has in the past joined forces with the Ogboni chief in attempting to harm the PA.

[4] The PA claims he was a notable youth leader for the APC of the Mushin local section, in Lagos, from 2014 to February 2015 and that his departure to the People Democratic Party [PDP] hurt the APC because many youth followed. He claims he was opposed to the corrupt practices in which his APC colleagues and a named agent of persecution [AOP] were involved, namely that public funds were being misappropriated by APC members for their personal use and benefit.

[5] He claims that starting in March 2015, he faced repeated threats. Then on November 18, 2015, the PA claims he escaped an attempt by one of the agents of persecution through other individuals to kill him at his worksite. Two of the PA's colleagues were killed during this attack. The Applicants claim they later learned that both AOP had been attempting to harm the PA.

[6] The PA further claims his relatives have also been targeted since, and that all these events were sponsored by the two APC affiliates mentioned. On March 7th, 2016, AOP's agents allegedly showed up at the PA's mother's home and attacked her. The family claims they then relocated and sought help from friends and family, but were still allegedly pursued by agents. On April 28, 2016, the Applicants left Nigeria and arrived in the U.S. the next day. In September 2017, they sought assistance to claim asylum, but do not know whether a claim was ever made on their behalf.

[7] While in the U.S., an AOP allegedly threatened the PA that if he returned, his property would be destroyed. The PA heard from a neighbour in Nigeria thereafter that his house and car were vandalised.

[8] On February 10, 2018, the Applicant crossed the U.S.-Canada border at Lacolle and made a refugee claim. They claim to seek protection in Canada because they fear for their lives and the torture they would face should they return to Nigeria.

[9] A few months later in May 2018 and November 2019, the AOP allegedly attacked the PA's half brother. Then on January 27th, 2020, they allegedly sent associates with weapons to

disrupt the PA's late mother's memorial service in Itire, Lagos. Ten people were injured and two of the PA's half-sisters were shot dead. This incident was reported at a police station in Itire.

[10] The RPD found the Applicants generally not credible and their claim lacking in evidence as to their youngest daughter. The RAD largely agreed with this conclusion.

III. Decision under review

[11] On August 13, 2021, the RAD dismissed the Applicant's appeal. The RAD found the Applicants "exhibited a lack of subjective fear by not fleeing the alleged persecution at the first opportunity" and agreed with the RPD on the credibility of their claims.

A. *Natural justice and procedural fairness*

[12] The RAD rejected the argumenta made by the Applicants that the RPD breached procedural fairness by not questioning them on a determinative issues, which concerns not asking if there was any risk to the youngest daughter in returning to the United States. This argument was not seriously pursued in this Court.

[13] As a secondary issue, the RAD also rejected the argument by the Applicants that the RPD breached procedural fairness by nor raising its concerns about the authenticity of key documents, pointing to the extensive questioning of the principal applicant on various reports.

B. *Lack of subjective fear*

[14] The RAD reaffirmed the RPD's finding that the Applicants' delaying their departure from Nigeria despite having resources to do so undermined the credibility of their stated fear. The family suggested they feared for their lives following an attack on November 18, 2015, but did not leave the country until April 28, 2016. They had valid U.S. and Schengen visas that provided the opportunity to flee. The RAD did not find the explanations for not doing so reasonable. The Applicants stated that they did not pursue the Schengen visa due to its limited timeframe, and the U.S. visa due to concerns about children travelling during school terms.

[15] The Applicants did not challenge this finding on appeal and, as such, the RAD drew a negative inference.

C. *Credibility concerns*

[16] The RAD disagreed with the Applicants' submission that the RPD failed to consider the totality of the evidence in finding that they were not credible concerning the principal applicants past political involvement. The RAD decision maker found notable contradictions between the principal applicant's direct testimony and his written Schedule A, which does not mention his political affiliations. In essence, the RAD found that his inability to provide detailed, personalized and spontaneous responses regarding his political affiliation cast doubts on his testimony and credibility.

[17] According to the RAD, the Applicants also failed to mention a link to the Ogboni cult, which is allegedly their principal AOP within their Basis of Claim [BOC] form. Given that they had previously provided amended versions of their BOCs prior to the hearing and confirmed that they were complete, true and correct, the RAD agreed with the RPD decision and considered this a negative inference on the Applicants' credibility.

[18] The RAD found the RPD made some errors in its assessment of the BOC, notably concerning the principal applicant's wrist injuries and sickness of both his children. The RAD, however, still found sufficient inconsistencies to warrant a negative credibility finding. In the RADs view, the submitted evidence did not overcome these inconsistencies.

[19] In the totality of its decision, the RAD considered the Applicants "generally not credible" due to the multiple concerns on the material elements of their claim as well has their behaviour. These concerns created serious doubts as to the legitimacy of their stated fear.

D. *Insufficient corroborative evidence*

[20] While the RAD did f the RPD had erred in qualifying a large amount of documentary evidence as "fraudulent", it gave these exhibits "limited weight in establishing the facts which are already found to lack credibility." The RAD found that the documents in question indirectly relayed claims by the Applicants and where, therefore, to be given little probative value. A police report, for example, reiterated that complaints were made, but did not directly establish the events alleged actually took place.

[21] The Applicants submitted new evidence as part of their claim, but the RAD did not find it sufficiently material to tip the balance in their favour. Specifically, a medical report, various affidavits from family members, photographs of injuries and letters detailing medical services were not considered, on a balance of probabilities, to be sufficiently reliable.

IV. Issues

[22] The only issues are procedural fairness and natural justice.

V. Standard of Review

[23] Questions of procedural fairness are reviewed on the correctness standard: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, per Binnie J at para 43. That said, I note in *Bergeron v Canada (Attorney General)*, 2015 FCA 160, per Stratas JA at para 69, the Federal Court of Appeal says a correctness review may need to take place in "a manner 'respectful of the [decision-maker's] choices' with 'a degree of deference': Re: *Sound v Fitness Industry Council of Canada*, 2014 FCA 48, 455 N.R. 87 at paragraph 42." But see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [per Rennie JA]. In this connection I also note the Federal Court of Appeal's recent decision holding judicial review of procedural fairness issues is conducted on the correctness standard: see *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship*), 2020 FCA 196 per de Montigny JA [Near and LeBlanc JJA concurring]:

> [35] Neither *Vavilov* nor, for that matter, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, have addressed the standard for determining whether the decision-maker complied with the duty of procedural fairness. In those circumstances, I

> prefer to rely on the long line of jurisprudence, both from the Supreme Court and from this Court, according to which the standard of review with respect to procedural fairness remains correctness.

[24] I also understand from the Supreme Court of Canada's teaching in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 23 that the standard of review for procedural fairness is correctness:

> [23] Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.
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> [Emphasis added]

[25] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50, the Supreme Court of Canada explains what is required of a court reviewing on the correctness standard of review:

> [50] When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[26] With regard to reasonableness, 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 [*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. This involves factual and legal constraints that bear on the decision:

> [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).
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> [Emphasis added]

VI. Analysis

A. *Was the RAD's decision procedurally fair?*

[27] The Applicants submit the RAD raised a new issue in its decision without providing the Applicants notice or an opportunity to respond. Specifically, it was noted in the Decision that the PA claimed his fear arose because he left the APC for the PDP in February 2015 due a disagreement as to AYC finances. However, the RAD took issue with this claim. In its finding and according to the IRB's National Documentation Package (NDP), the PDP was in political power from 1999 until after the March 2015 elections, not the APC. In the Applicant's view, this finding fails to consider other evidence that demonstrates the broader political structure in Nigeria. In doing so, the RAD did not consider whether the ruling party held power at the state or local level at that time. The PA specifically noted in his testimony that he was only involved at the local level. The Applicants state:

> 41. Further, the Principal Applicant's testimony clearly noted he was politically involved at the local government level.
>
> > **MEMBER:** Okay. And, which level of government are you talking about here?
> >
> > **CLAIMANT:** I'm talking about the local government.
> >
> > **MEMBER:** Okay. When it's the local government, is -- is that in Lagos?
> >
> > **CLAIMANT:** Yes, in Lagos. 45
> >
> > **MEMBER:** Is that -- is it the city? Is it the community? Is it the state?
> >
> > **CLAIMANT:** It's Mushin local government.

TAB 4, Application Record at pp. 57,
RPD Hearing Transcript at p. 14

42. The RAD ignored this contradictory evidence and concluded that the Principal Applicant's testimony and evidence was again not credible regarding his political affiliation. The NDP does not contain specific information regarding the party incumbents in Lagos State. However, a simple internet search of publicly available sources on the internet shows the APC was the ruling party in Lagos State many years before 2014 and after 2015. Such documentation could not be provided to the RAD because this issue was not put to the Applicants at the RPD nor the RAD.

43. The Federal Court has held that when a new question and a new argument have been raised by the RAD in support of its decision, an opportunity must be given to the applicant to respond to them.

> ***Husian v Canada (Citizenship and Immigration)*, 2015 FC 684 at paras 9-10; *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 at para 25 [*Kwakwa*]**

44. In *Ching*, the RAD had considered credibility conclusions which had not been raised by the applicant on appeal of the RPD decision.

> ***Ching v Canada (MCI)* 2015 FC 725 at paras 65-76 [*Ching*]**

45. The Court has outlined guiding principles in addressing allegations of procedural fairness based on new issues raised by the RAD. In *Kwakwa*, as summarized in *He*, the Federal Court provided as follows:

- the RAD cannot give further reasons based on its own review of the record if the refugee claimant has not had the chance to address them: para 22;

- credibility conclusions not raised by the applicant on appeal of the RPD decision amounted to a "new question" on which the RAD had the obligation to advise the parties and offer them the opportunity to make observations and provide submissions: para 25;

> - when additional comments regarding the documents submitted by an applicant in support of [a critical element of their claim], were not raised or addressed specifically by the RPD, the applicant should at least have been given an opportunity to respond to those arguments and statements made by the RAD before the decision was issued: para 26;
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> ***He v Canada (Citizenship and Immigration)*, 2019 FC 1316 at para 79 [*He*], summarizing *Kwakwa***
>
> 46. The RAD noted that it did not confront the Applicants regarding this aspect of the documentary evidence, but it was not necessary to do so because this is "generally well-known information which was also in the country evidence before the RPD" and "it merely adds to already significant credibility concerns already outlined…".
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> **TAB 2, Application Record at p. 25, RAD Decision and Reasons at para 45.**
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> 47. The Applicants submit that this is a new issue, not just another element that supports the RPD's finding of a lack of credibility. Further, while the Federal Court has held that the RAD is entitled to make independent credibility or plausibility findings against an applicant without confronting the applicant and giving them an opportunity to respond, contrary to the RAD's reasoning, this only holds for situations where the RAD does not ignore contradictory evidence or make additional findings or analyses on issues unknown to the applicant.
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> ***Kwakwa* at para 24; *Koffi v Canada (Citizenship and Immigration)*, 2016 FC 4 at para 38; *Ortiz v Canada (Citizenship and Immigration)*, 2016 FC 180 at para 22.**

[28] The Respondent submits the RAD reasonably understood that the PA was involved with local politics when making its determination, so the Applicant's position on this point is unfounded. The RPD put the PA on notice about his ambiguous testimony and asked him to

clarify. This, in the RADs view, was sufficient to impeach his credibility that the PDP was the federal opposition party at the time of the alleged corruption.

[29] On this point, I substantially agree with the Applicants. With respect, in my view the RAD misses the point in its determination. The RPD did not consider there were inconsistencies in the PA's testimony in comparison to the IRB's National Documentation Package. To do so on appeal – as the RAD did in this case - without providing the PA and his family notice and the opportunity to respond was procedurally unfair. At the very least, the testimony is unclear as to which level of government was corrupt. It would have been procedurally fair for the RAD to seek clarification from the Applicants on this the new issue.

[30] I agree that Federal Court jurisprudence holds that when a new question and argument have been raised by the RAD in support of its decision, an applicant must be given an opportunity to respond (See *Husian v Canada (Citizenship and Immigration)*, 2015 FC 684 at paras 9-10 and *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 at para 25).

[31] The Applicants state that a simple internet search would establish that it was the ACP and not the PDP that was in power when the Applicant defected in February, 2015. However, I note there is no affidavit attesting to this fact, but only counsel's statement of the results of her "simple" internet search. Normally an affidavit could and should have been filed. Affidavits are generally allowed on judicial review in support of procedural fairness arguments. But this breach of procedural fairness does not require confirmation of resulting error; the breach itself requires

the Court to intervene and set aside this Decision. The results of counsel's internet search do however illustrate the consequences failing to follow a procedurally fair process.

[32] I should add that if the RAD had this issue in mind before or at the hearing, it should have raised it with the Applicants. Nothing could have been easier. There is no reason not to have raised it at the hearing. If this occurred to the tribunal after the hearing, as a further issue to consider perhaps, it should have been the subject of a follow-up procedural fairness letter. I can see no reason why this was not raised with the Applicants before, during or after the hearing. This is all the more so given the manifest and undoubted centrality of the PA's alleged split with the APC in the RAD's credibility assessment.

[33] Given my finding on this matter, judicial review must be granted; I am certainly not satisfied the result would have been the same.

B. *Credibility of the PA*

[34] Numerous credibility issues were canvassed at this judicial review. I need not address them here given judicial review will be granted.

[35] Two issues should be noted however.

[36] First, the Applicants produced a police report concerning the beating the PA received on November 18, 2015. The RAD gave it no "weight" because among other things "it only mentions that the PA had reported the alleged attack to the police on November 25, 2015 but

does not independently verify these events took place nor that there is evidence of this attack" - RAD reasons para 60. This comment is not reasonable. All victim reports to police are of this nature – they are the reports by victims. It cannot be that all victim reports are of no weight because they are the reports of victims. Nor is the comment saved by the observation there is no evidence of the attack – I add this for two reasons. First, a genuine victim's report is of course evidence of an attack, although its weight is to be assessed by the tribunal. Secondly, it cannot be that all victim reports are to be given "no weight" (as happened here) where they are not accompanied by other evidence. I say this because generally it is for the police and not the victim to uncover evidence after investigation.

[37] I thus caution against giving victim reports "no weight" because they are only the reports of the victim and or because they lack other evidence than that of the victim. I appreciate there were other reasons concerning the credibility of the PA's narrative, but this was not a legitimate one. The police report was introduced as corroboration, and was assessed as such, but this ultimate conclusion respecting this police report cannot be relied upon because it cannot be ascertained to what extent this unreasonable consideration factored into the analysis.

[38] Secondly, there were two medical reports concerning the same incident. The RPD considered the first, improperly as the RAD found, to be fraudulent. A second was provided and accepted by the RAD as new evidence. However it was criticized by the RAD at para 72 because it "simply states that he had been a patient and does not, on its own, establish the November 18, 2015 attack or any link to his political activism, as claimed." This highlights a catch-22 for applicants and an additional line of impermissible reasoning. I say this because, if their medical

report says the claimant's injuries were cause by an improperly motivated attack, it is criticized as hearsay because the doctor was not there. If there is no statement to that effect, it is downplayed (as here) because it does not "establish" either the attack its reason. Medical reports need not "establish" either. In my view, a far better practice is that genuine medical reports be accepted for the medical information they properly contain. Usually they may be corroborative evidence. I understand the second report was advanced as proof of the politically motivated attack. Rejecting it as direct evidence might have been reasonable, but that would not necessarily be the case if it was advanced as corroborative evidence or as partly direct and partly corroborative evidence.

VII. Conclusion

[39] In my respectful view, the Applicants have established the Decision is procedurally unfair, and contained assessments made contrary to constraining law thus being unreasonable per *Vavilov*. Therefore, the application for judicial review will be granted.

VIII. Certified Question

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

JUDGMENT in IMM-6042-21

THIS COURT'S JUDGMENT is that judicial review is granted, the Decision is set aside, the matter is remanded for reconsideration by a differently constituted panel, 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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STYLE OF CAUSE:	LUKMON OWOLABI SHOYEBO, RODEEYAH MONISOLA SHOYEBO, AISHA MOSUNMOLA SHOYEBO, RAFIAT AYOBAMI SABIU v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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