

Federal Court



Cour fédérale

Date: 20230831

Docket: IMM-7930-21

Citation: 2023 FC 1184

Ottawa, Ontario, August 31, 2023

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

JOHN OSORA ONKOBA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] John Osora Onkoba [Applicant] seeks judicial review of the Refugee Appeal Division's [RAD] October 7, 2021 decision [Decision] upholding a decision of the Refugee Protection Division [RPD], where the RPD found that the Applicant was neither a Convention refugee nor a person in need of protection within the meaning of sections 96 and 97 of the *Immigration and*

Refugee Protection Act, SC 2001, c 27 [IRPA]. The determinative issue for the RAD was credibility.

[2] For the reasons that follow, the application for judicial review is dismissed. The Decision was reasonable and the RAD did not breach the Applicant's right to procedural fairness.

II. Background

[3] The Applicant is a citizen of Kenya. His wife and four children live in Kenya. The Applicant claims that he is at risk of harm from local businessmen and the Chinkororo gang due to his father's non-payment of a loan. The following facts are found within the Applicant's basis of claim [BOC] form.

[4] In January 2015, the Applicant's father took out a loan for five million Kenyan shillings, which he was unable to repay. Two local businessmen signed as guarantors. In September 2015, the Applicant's father was forced to sign a repayment agreement for ten million Kenyan shillings plus interest. In September 2015, the Applicant's father fled. Between January and February 2016, the businessmen demanded that the Applicant repay the loan and sell the family property to repay the debt. The Applicant paid the businessmen 80 thousand Kenyan shillings but refused to give up or sell his family's property.

[5] In March 2016, members of the Chinkororo gang assaulted and robbed the Applicant. He was treated for his injuries at a medical clinic. The Applicant attempted to file a report with the

police, but the officer asked for a bribe to pursue the matter. Instead, the Applicant sought assistance from the village elders.

[6] In March 2017, due to threats he was receiving about the unpaid debt, the Applicant and his family moved to Mombasa, where he stayed for four months. In July 2017, the Applicant returned to his hometown, Kisii, to arrange for the funeral of his brother. While in Kisii, a group of men assaulted the Applicant, resulting in the Applicant's hospitalization for four days. He attempted to report the incident to the police, who again asked for a bribe.

[7] In August 2017, immediately after the funeral, the Applicant moved in with his cousin in Njoro. In November 2017, another threatening phone call prompted him to move to Dondoli. Over the next several months, the Applicant heard from various individuals that the Chinkororo gang was seeking him and would kill him if they caught him. In January 2019, several men assaulted the Applicant outside of his home in Dondoli. The next day, he travelled to Nairobi to stay with another cousin who would assist in his departure from Kenya. On April 18, 2019, the Applicant was issued a visa to enter Canada.

[8] On May 6, 2019, the Applicant arrived in Canada and made a claim for refugee protection. On May 22, 2019, the Applicant attended a port-of-entry [POE] interview with a Canada Border Services Agency Officer [CBSA Officer]. The CBSA Officer prepared a report under subsection 44(1) of the *IRPA*, concluding that the Applicant was inadmissible to Canada pursuant to paragraphs 20 (1)(a) and 41(a) and of the *IRPA*, as well as section 6 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227. Upon reviewing the report,

the Minister of Immigration, Refugees and Citizenship Canada's delegate referred the matter to the RPD for a hearing. The hearing was held on February 26, 2021 and March 18, 2021.

[9] On April 19, 2021, the RPD denied the Applicant's claim for refugee protection. The determinative issue for the RPD was credibility. The RPD assessed the Applicant's claim under subsection 97(1) of the *IRPA*, having found that the Applicant's allegations did not establish a nexus to a Convention ground under section 96 of the *IRPA*. The RPD found that the Applicant failed to establish that he was being sought by the businessmen and Chinkororo gang in Kenya. The RPD also found that the Applicant failed to establish that he was the victim of targeted violence because of his father's loan.

[10] The Applicant appealed the RPD's decision to the RAD. The Applicant submitted that the RPD erred in its credibility assessment and that the panel demonstrated bias towards him at the hearing. The Applicant also asked the RAD to admit new evidence.

III. The Decision

[11] The RAD refused to admit a new psychological report as evidence because it did not meet the requirements of subsection 110(4) of the *IRPA*. Specifically, the RAD found that the report's contents did not arise after the rejection of the Applicant's claim as they attempted to establish his state of mind at both the POE interview and the RPD hearing. The RAD also found that the Applicant failed to establish that the report was not reasonably available or that he could not have reasonably been expected to present it to the RPD prior to the rejection of his claim. The RAD noted that the Applicant's testimony before the RPD demonstrated his awareness of

his potential psychological issues at the time of the RPD hearing, and that the Applicant did not request additional time following the hearing to submit a report.

[12] The RAD considered the Applicant's allegation of bias. The RAD found that, in assessing the credibility of the Applicant's testimony and evidence, the RPD treated the Applicant and his claim objectively and fairly.

[13] Regarding the Applicant's credibility, the RAD acknowledged that claimants are not expected to present their entire claim and all relevant details at the POE interview. However, the RAD agreed with the RPD that there were significant discrepancies between the Applicant's BOC narrative and his testimony and his POE interview. For instance, the Applicant stated during his POE interview that his father had taken the loan in March 2016; the businessmen sought repayment in April 2016; the original debt was 800 thousand Kenyan shillings, but the businessmen involved the police in the repayment of two million Kenyan shillings; he was attacked by a gang in December 2016 but did not go to a hospital for treatment; and his last contact with the agents of harm occurred in July 2018. The RAD agreed with the RPD that it is reasonable to expect that the Applicant would remember the January 2019 assault at the time of the POE interview, given that it occurred a few months prior and was the alleged impetus for his decision to flee.

[14] Lastly, the RAD agreed that the RPD was correct to seek corroborative evidence from the Applicant to establish the allegations at the core of his claim. While the RAD found that the RPD

erred in certain aspects of its analysis, the Applicant's corroborative evidence was insufficient to establish independently his allegations of past harm and forward-facing risk in Kenya.

[15] The RAD first considered the affidavit evidence of the Applicant's wife, cousin, and village elder. Generally, the RAD gave low weight to the wife and cousin's affidavits, as they made broad statements of the Applicant's alleged risk and were not subject to cross-examination. The RAD also noted that the affidavit of the Applicant's wife only spoke to events following the Applicant's departure from Kenya, notwithstanding the fact that she was said to have witnessed a number of key events in question. As for the affidavit of the Applicant's cousin attesting to the destruction of the Applicant's home, the RAD noted that he did not provide a first-hand account of the events and that the date stamps of his photographic evidence indicated that the photos were taken prior to the alleged attack, thereby undermining the credibility of the allegation. Lastly, the RAD placed some weight on the affidavit from a village elder, who corroborated the loan dispute and the Applicant's alleged risk, but that this affidavit was insufficient to establish the Applicant's allegations.

[16] The RAD also found that the Applicant's remaining evidence was insufficient to establish his allegations. Namely, the RAD found that the reliability of a Kenyan medical report was undermined by the inclusion of a different surname. Nevertheless, even accepting the report as credible, it did not establish that the Applicant's injuries occurred as alleged. Further, the RAD placed no weight on a letter from the Applicant's other cousin who initiated the Applicant's departure from Kenya, as she did not witness the alleged events.

[17] Ultimately, the RAD upheld the RPD's finding that the Applicant was not credible and dismissed the appeal.

IV. Issues and Standard of Review

[18] The issues are best characterized as:

- (1) Was the Decision reasonable?
 - a. Did the RAD unduly rely on the Applicant's POE statements?
 - b. Did the RAD err in its assessment of the corroborative evidence?
- (2) Was there a breach of procedural fairness?

[19] I agree with the parties that the standard of review for the merits of the Decision is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov]). This case does not engage one of the exceptions set out by the Supreme Court of Canada, therefore, the presumption of reasonableness is not rebutted (at paras 16-17). A reasonableness review requires the Court to consider both the outcome of the decision and the underlying rationale to assess whether the decision, as a whole, 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 paras 15, 99).

[20] A decision will be unreasonable where there are shortcomings in the decision that are sufficiently central or significant (*Vavilov* at para 100). This may include instances where the

decision-maker has failed to account for the evidence before it (*Vavilov* at para 126). If the reasons of the decision-maker allow a reviewing Court to understand why the decision was made and determine whether the decision falls within a range of acceptable outcomes, the decision will be reasonable (*Vavilov* at paras 85-86). The party challenging the decision bears the burden of showing that the decision was unreasonable (*Vavilov* at para 100).

[21] On the other hand, issues of procedural fairness involve a standard of review akin to correctness (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*CP Railway*]; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). The Court has no margin of appreciation or deference on questions of procedural fairness. Rather, when evaluating whether there has been a breach of procedural fairness, a reviewing court must determine if the procedure followed by the decision-maker was fair, having regard to all the circumstances (*CP Railway* at para 54; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at 837-841).

V. Analysis

A. *Was the Decision reasonable?*

(1) Did the RAD unduly rely on the Applicant's POE statements?

(a) *Applicant's Position*

[22] The RAD erred in its credibility finding when it stated that there were significant disparities in the core elements of his claim when viewing the POE interview notes and those

made in the BOC narrative. It is questionable whether the RAD assessed the nature of the questions posed during the POE interview. First, the majority of the CBSA Officer's questions concerned the terms of the loan. While there are some inconsistencies in this regard, the specific terms are challenging to recall under the stress of an interview conducted without counsel or an interpreter.

[23] Second, the Applicant described the December 2016 event in a similar manner to the March 2016 event in the Applicant's BOC narrative. The general facts were consistent. The Applicant's POE statement does not preclude the fact that he was assisted and taken to a medical clinic, not a hospital, for treatment.

[24] Third, the Applicant's omission of the subsequent two assaults and three relocations from his hometown stems from the CBSA Officer's failure to ask the Applicant to describe all of the incidents that led him to flee Kenya. Regardless, the Applicant's POE statements are not a part of the claim itself, and should not be expected to contain all details of a claim (*Cetinkaya v Canada (Citizenship and Immigration)*, 2012 FC 8 at para 51). Lastly, the RAD's conclusion surrounding the Applicant's recollection of the January 2019 incident ignores the wording of the CBSA Officer's question. It was unclear to whom the CBSA Officer was referring, and the term "heard" suggests the Applicant engaged in dialogue. The Applicant's response intended to demonstrate when he was last in direct contact with the agents of persecution.

[25] In any event, this Court has cautioned against relying on POE statements (*Wu v Canada (Citizenship and Immigration)*, 2010 FC 1102 at para 16 [*Wu*]; *Guven v Canada (Citizenship and Immigration)*, 2018 FC 38 at paras 39-42 [*Guven*]).

(b) *Respondent's Position*

[26] A decision-maker may draw negative inferences based on inconsistencies between an Applicant's POE evidence and oral testimony (*Farah v Canada (Citizenship and Immigration)*, 2019 FC 27 at para 21 [*Farah*]). The Applicant is requesting this Court accept alternative explanations for his discrepancies, which is not the function of judicial review (*Balogh v Canada (Citizenship and Immigration)*, 2016 FC 426 at para 17). There is no record of the Applicant's request or need for counsel or an interpreter, nor is there any evidence that the Applicant had difficulty communicating during the POE interview (*Wu* at para 17). Further, the Applicant's argument that the CBSA Officer did not ask for "all of the incidents" mischaracterizes the RAD's problems with the statements. Namely, the RAD took issue with the content of the statements, not the quantity.

[27] Further, the Court in *Wu* found that the board reasonably found that the applicant was not credible based partly on his POE statements. Here, there were marked differences between the Applicant's account on key issues in his POE interview, BOC narrative, and RPD testimony. Notably, the Applicant's POE interview and BOC form occurred two weeks apart.

(c) *Conclusion*

[28] The RAD did not err in its consideration of the Applicant's POE interview statements. The inconsistencies pointed out by the RAD were not minor but went to the core elements of his claim.

[29] I accept that decision-makers must exercise caution against undue reliance on POE statements with respect to "omissions and lack of detail as the sole basis for negative credibility findings", as POE statements are not expected to contain all of the details of a claim [emphasis added] (*Guven* at para 42; *Wu* at para 16). However, inconsistencies between POE statements, the BOC narrative, and testimony can ground credibility findings where they are "major" and go to "crucial elements of a claim" (*Guven* at para 41; *Jamil v Canada (Minister of Citizenship and Immigration)*, 2006 FC 792 at para 25).

[30] In the present matter, the RAD clearly acknowledged as much:

[34] I acknowledge that claimants are not expected to present their entire claim and all relevant details at the POE, however, this is not a case of the panel focusing on a few minor inconsistencies or omissions in the [Applicant's] statements at the POE. Here, the [Applicant's] story substantially changed in respect of key events and allegations at the core of his claim, and I find that the discrepancies between the POE statements and the narrative and testimony are serious and significant.

...

[39] While nervousness might make it difficult to remember dates and specific details, the discrepancies identified go beyond that to the extent that the [Applicant] provided significantly different versions of key events and circumstances underpinning his claim.

[Emphasis added.]

[31] I agree with the Respondent that the Applicant has provided no evidence of his request for counsel, nor difficulties in communicating with the CBSA Officer during his POE interview (*Wu* at para 17). Rather, the sole evidence is the Applicant's statutory declaration at the POE interview stating that he speaks and understands the English language. The CBSA Officer also instructed the Applicant to advise if he did not understand the questions. The POE interview transcript does not illustrate that the Applicant did so. Accordingly, the Applicant's argument in this regard has no merit.

[32] As for the Applicant's remaining arguments surrounding the RAD's failure to consider the CBSA Officer's use of the terms "hospital" and "heard" during the POE interview in considering the discrepancies with the Applicant's alleged interactions with the agents of harm, in my view, the Applicant is asking this Court to engage in a line-by-line treasure hunt for error (*Vavilov* at para 102). As noted by the RAD, the POE interview occurred over two weeks after the Applicant's initial arrival to Canada, permitting him time to rest and prepare for the interview (at para 38). Notably, the POE transcript surrounding the January 2019 incident reads as follows:

Q: When was the last time you received a threatening phone call?

A: July 2018. They said they wanted to see me. A gang. I told them I could come.

Q: What has happened since then?

A: That was when I started looking at how I could be safe.

Q: You haven't heard from the debtors (or this gang) since?

A: No, they have not been able to find me. Some of the villagers have told me they have come looking for me. They contact me by phone or I see them in town.

Q: Anything else to add?

A: They attacked me in December 2016. On my way home from town late evening, they stopped me, they (the gang that the owner of the money was using) asked me some questions I could not answer. The group leader slapped me because I argued with him. There was 8 men. They beat me up.

[Emphasis added.]

[33] The above excerpt clearly illustrates that the Applicant was alive to the possibility that the CBSA Officer's question included the agents' ability to locate the Applicant, and not merely when he last engaged in dialogue. In my view, the RAD reasonably concluded that it was not persuaded that these discrepancies were reasonably explained by the Applicant's submissions, and that it was reasonable to expect the Applicant to remember the January 2019 incident at the time of the POE interview, given that it occurred a few months prior. In the present matter, the record before the RAD does indicate some significant inconsistencies, which the RAD pointed out. The RAD's findings of credibility must be given deference by this Court (*Farah* at para 15).

(2) Did the RAD err in its assessment of the corroborative evidence?

(a) *Applicant's Position*

[34] The RAD erred in finding that the Applicant's corroborative evidence was insufficient to establish his claim. Contrary to the RAD's conclusion, the affidavits of the Applicant's wife and

cousin corroborated the Applicant's version of events. The cousin explained that the Applicant sought refuge at his home in Njoro. The Applicant's wife also spoke of a subsequent visit by one of the businessmen in August 2019 as well as the destruction of their home by the Sungu Sungu on September 22, 2020. Further, a letter from the Applicant's other cousin supported the Applicant's claim that he was being pursued by businessmen and the Chinkororo due to the non-payment of his father's loan, that the Chinkororo continued to pursue the Applicant while in hiding, and that the Chinkororo attacked his property. The village elder's affidavit, in combination with the aforementioned affidavits, cumulatively demonstrated that the Applicant faced some degree of persecution.

[35] Since the RAD based its conclusion regarding the affidavit evidence on its earlier negative credibility findings relating to the BOC narrative and POE statements, it failed to give weight to this otherwise credible evidence (*Toth v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1133 at para 26). The RAD was under a duty to give reasons for casting doubt on the Applicant's credibility (*Oria-Arebun v Canada (Citizenship and Immigration)*, 2019 FC 1457 at para 55 [*Oria-Arebun*]). Failure to do so renders the Decision unjustifiable.

[36] Further, the RAD erred in engaging in a microscopic evaluation of the Kenyan medical report (*Moute v Canada (Minister of Citizenship and Immigration)*, 2005 FC 579 at para 15 [*Moute*]; *Kanagarasa v Canada (Citizenship and Immigration)*, 2015 FC 145 at para 13 [*Kanagarasa*]). The misrepresentation of the Applicant's surname in the report is a minor error and does not equate to the document being fraudulent (*Tatah v Canada (Citizenship and*

Immigration), 2019 FC 1109 at paras 13, 28). The medical report corroborated the Applicant's BOC narrative regarding the timing of his injuries.

(b) *Respondent's Position*

[37] The RAD undertook an independent analysis of the documentary evidence by first assessing the probative value of each document before assigning it weight. The RAD reasonably found that the documentary evidence was insufficient to overcome its credibility concerns. The Applicant seeks to engage in a microscopic line-by-line treasure hunt for error.

(c) *Conclusion*

[38] The RAD did not err in its assessment of the corroborative evidence.

[39] I agree with the Respondent that the RAD undertook an independent analysis of the corroborative evidence. The RAD first found that the RPD erred in giving lower weight to the affidavits on the basis that they did not indicate the name of the person who drafted the affidavits. The RAD also agreed with the Applicant that the RPD erred in drawing an adverse inference regarding the reliability of the affidavit of the Applicant's wife due to a discrepancy in the length of their marriage.

[40] After setting out these errors, the RAD proceeded to analyze the content of the affidavits and other documentary evidence, finding it insufficient, individually or collectively, to establish the Applicant's allegation of past harm and forward-facing risk in Kenya.

[41] In conducting its independent analysis, I acknowledge that the RAD did not reference the affidavit attestation of the Applicant's cousin that the Applicant stayed with him in Njoro from August to November 2017. However, the Applicant has failed to demonstrate that that this omission, in and of itself, is determinative and amounts to the RAD not having regard to the material before it (*Basanti v Canada (Citizenship and Immigration)*, 2019 FC 1068 at para 24). The jurisprudence cited by the Applicant in this regard is distinguishable in that the panels in those cases disregarded considerable documentary evidence pointing to an opposite conclusion. Here, the Applicant only points to a single excerpt within one affidavit.

[42] Moreover, the RAD clearly referenced the August 2019 and September 2020 incidents set out in the affidavit of the Applicant's wife. However, the RAD also reasonably found that the wife's affidavit generally spoke to the Applicant's risk from the businessmen and Chinkororo gang. Lastly, I note that the other cousin's affidavit was not assessed based on its generalities. Rather, the RAD noted that this cousin did not witness the alleged events, but was reporting information provided by the Applicant. The cousin's affidavit begins with the words "My cousin John...explained to me that..." For these reasons, I am of the view that the RAD did provide reasons for casting doubt on the Applicant's credibility (*Oria-Arebun* at para 55).

[43] Lastly, the Board did not base its findings on a microscopic examination of evidence that is irrelevant or peripheral to the Applicant's claim (*Moute* at para 15; *Khan v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1490 at para 19). As explained by the RAD, the Kenyan report was central to the Applicant's allegation of an assault in July 2017, where he was left bleeding from his arm and nose, taken to the hospital unconscious, and received a chest x-ray

as well as antibiotics and painkillers. Before the RPD, the Applicant testified that he did not know why the name was incorrect. While the RAD did raise concerns about the difference in surnames in the Kenyan report, the RAD moved beyond this and assessed its contents, thereby distinguishing the present matter from *Kanagarasa* (at para 13) and *Tatah* (at para 28). Namely, the RAD went on to find that, more importantly, even accepting the report as credible evidence, it did not establish that the injuries central to the Applicant's claim occurred under the circumstances that the Applicant alleged.

[44] It is not for this Court to reweigh evidence (*Vavilov* at para 125). The RAD's Decision was reasonable.

B. *Was there a breach of procedural fairness?*

(1) Applicant's Position

[45] The RAD breached the Applicant's right to procedural fairness by taking issue with the content of the affidavits of the Applicant's wife and cousin. The RPD did not question the affidavits on this basis. Had the RAD raised this as an issue or provided the Applicant an opportunity to respond, he could have addressed the RAD's concerns about the perceived generalities (*Canada (Citizenship and Immigration) v Alazar*, 2021 FC 637 [*Alazar*]).

(2) Respondent's Position

[46] The Applicant's credibility was already at issue before the RPD, and it is not a breach of procedural fairness for the RAD to make an additional credibility finding using the same

evidentiary record before the RPD (*Bebri v Canada (Citizenship and Immigration)*, 2018 FC 726 at para 16 [*Bebri*]; *Oluwaseyi Adeoye v Canada (Citizenship and Immigration)*, 2018 FC 246 at paras 11-13 [*Oluwaseyi Adeoye*]). The affidavits were submitted to support the Applicant's claim and thus his credibility. The Applicant has not demonstrated that he was unaware of the case to meet.

(3) Conclusion

[47] The RAD did not breach the Applicant's right to procedural fairness.

[48] As stated by Justice Norris in *Alazar*:

[77] The precise test for whether procedural fairness required notice to the parties and an opportunity to be heard is whether the ground on which the RAD decided the matter is a new issue in the sense that it is legally and factually distinct from the grounds of appeal advanced and cannot reasonably be said to stem from the issues on appeal as framed by the parties

[Emphasis added.]

[49] Where new issues are raised, the appellate body must notify the parties and provide an opportunity to respond (*Oluwaseyi Adeoye* at para 12). The RAD did not raise a new issue in considering the content of affidavits of the Applicant's wife and cousin. First, the Applicant's credibility was already at issue before the RPD. Second, the affidavits were part of the evidentiary record before the RPD and the RAD. Significantly, the Applicant raised the RPD's credibility assessment of the affidavits as an issue in his written submissions to the RAD. Accordingly, the RAD reviewed and assessed the very documents identified by the Applicant in response to his written submissions. The RAD is entitled, and indeed obliged, to independently

assess the documentary evidence (*Bebri* at para 16; *Sary v Canada (Citizenship and Immigration)*, 2016 FC 178 at para 29). The RAD's conclusion surrounding the generalizations within the affidavits relate directly to establishing the Applicant's allegations of risk and ultimately his overall credibility. The fact that it saw the evidence differently is not a basis to challenge the decision on this ground when no new issue was raised (*Ibrahim v Canada (Citizenship and Immigration)*, 2016 FC 380 at para 30).

VI. Conclusion

[50] For the above reasons, the application for judicial review is dismissed. The Decision was reasonable and the RAD did not breach the Applicant's right to procedural fairness.

[51] The parties do not propose a question for certification and I agree that none arises.

JUDGMENT in IMM-7930-21

THIS COURT'S JUDGMENT is that:

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

"Paul Favel"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-7930-21

STYLE OF CAUSE: JOHN OSORA ONKOBA v THE MINISTER OF
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PLACE OF HEARING: TORONTO, ONTARIO

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