

Federal Court



Cour fédérale

Date: 20251106

Docket: IMM-20420-24

Citation: 2025 FC 1784

Ottawa, Ontario, November 6, 2025

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

**AYOBAMI SOLOMON POPOOLA
ABIDEMI DEBORAH POPOOLA
AYOBAMI DANIEL POPOOLA
OLUWAPAMILERIN ENOCH POPOOLA
(LITIGATION GUARDIAN OF)**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicants are a family of four who are all citizens of Nigeria. The family includes the Principal Applicant Ayobami Solomon Popoola [Principal Applicant], his spouse Abidemi Deborah Popoola [Spouse], and their two children. They entered Canada in December 2018 and sought refugee protection based on their alleged fear of persecution by members of a criminal

syndicate, involving politicians and other officials, who obtained fraudulent bank loans from the bank where the Principal Applicant worked. According to the Principal Applicant, his role in investigating and submitting a report about the fraud that named specific individuals (the alleged agents of persecution), resulted in him and his family becoming targets of the criminal syndicate. The Refugee Protection Division [RPD] rejected the Applicants' claims. The Refugee Appeal Division [RAD] upheld the RPD's decision. Credibility was the determinative issue for the RPD and the RAD. The Applicants sought judicial review of the RAD's decision, but their application was dismissed by this Court (*Popoola v Canada (Citizenship and Immigration)*, 2022 FC 555).

[2] The Applicants subsequently brought applications for permanent residence based on humanitarian and compassionate grounds as well as a Pre-Removal Risk Assessment [PRRA] application, both of which were denied by the same senior immigration officer [Officer] by decisions dated August 26, 2024. This is the judicial review of the negative PRRA decision.

Background

[3] In their PRRA application the Applicants asserted two new grounds of risk. First, that the family would be at risk of persecution at the hands of the Principal Applicant's mother and extended family. This is because the Spouse suffers from a uterus fibroid causing an abnormal monthly loss of blood. When the Principal Applicant informed his mother of his Spouse's condition, in the hope of being provided with helpful herbs from Africa, his mother and extended family instead accused the Spouse of witchcraft. They asserted that the Spouse's monthly blood loss was a deliberate donation of blood to a witchcraft coven and blamed the illness of the Principal Applicant's mother on his Spouse.

[4] Second, that Daniel, the eldest son, had recently informed his family of his sexual orientation as a gay man. The Applicants submitted that this put him, and the rest of the family which supports him, at risk of persecution and stigmatism if they were returned to Nigeria where homosexuality is not tolerated and is illegal.

Decision Under Review

[5] The Officer accepted that the Spouse was threatened and accused of witchcraft by her mother-in-law and found that country conditions documents confirm that individuals accused of witchcraft could be subject to physical violence and death. However, that there must also be an individual assessment of whether, beyond the accusation of witchcraft, there was a reasonable chance of persecution. The Officer concluded, based on the evidence before them, that the individual assessment of the Spouse's membership in this particular social group demonstrated that her risk was quite low. The Officer also found that there was a correlation between the threats and the health of the Spouse and her mother-in-law. However, there was no evidence of a health status update for either. If the latter's condition had not worsened, then motivation for the in-laws to act on their threats was not demonstrated. The existence of threats alone did not demonstrate a reasonable chance of persecution.

[6] Further, that the Principal Applicant and his Spouse are highly educated, hold professional jobs and are financially secure. The documentary evidence indicates that this social position makes them less vulnerable to serious harm because they have the power to enlist the services of the police if needed. Based on the evidence before them, the Officer was satisfied that

state protection exists in Nigeria and is accessible to the Applicants. Further, that the Applicants had not provided clear and sufficient evidence of the state's inability to protect them.

[7] As to risk arising from Daniel's sexual orientation, the Officer noted that an oral hearing had been held by video conference, with counsel and Daniel's family present, to address his sexual orientation. The Officer did not find Daniel to be a credible witness. The Officer also noted that during the hearing Daniel revealed that he had been in a same-sex relationship since February 2024. However, he had not submitted any information regarding his relationship prior to the hearing, nor did he provide post-hearing submissions to corroborate information regarding his partner.

[8] The Officer found that, given the Applicants past interactions with the immigration system, they were aware of the need to provide sufficient evidence. However, they had not provided any documents to establish the identity of Daniel's partner or pertaining to his relationship with his partner. This was particularly striking as the Applicants had continued to make submissions right up to the date of the hearing, even submitting the results of their Covid tests. The Officer found that their alleged fear was incompatible with their actions, greatly diminishing the credibility of the Applicants' statements. The Officer concluded that Daniel had not established his sexual orientation and, therefore, did not face a risk of return to Nigeria.

Issues and Standard of Review

[9] The issues that arise in his matter are whether there were breaches of the duty of fairness by the Officer and whether the decision was reasonable.

[10] The standard of review for issues of procedural fairness is correctness (see *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35). Functionally, this requires the Court’s analysis to focus on whether the procedure followed was fair, having regard to all the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

[11] The standard of review on the merits of the Officer’s decision is reasonableness. On judicial review the court “asks 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” (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 99).

Procedural Fairness

[12] The Applicants first argue that the Officer found Daniel not to be credible, in part, because of the lack of evidence about his same-sex partner. However, that an affidavit of the Applicant’s former counsel, Gokhan Toy, filed in this application for judicial review, attests that in the days prior to the PRRA hearing (July 26 and 27 and the morning of August 6, 2024) the Applicants provided him with supporting documentation. Former counsel states that on July 31, 2024, and on the day of the hearing, August 6, 2024, he sent this information to the Officer. However, it was only after the PRRA decision was made, and upon inquiry from current counsel, that he realized that zipped documents provided by the Applicants were inadvertently not included in the evidence submissions he made to the PRRA Officer. The affidavit states that

these zipped files included a letter from Daniel's same-sex partner, evidence of his participation in recent LGBTQ events with his partner and other relevant supporting documentation associated with risk as a gay person in Nigeria.

[13] The Applicants assert that there was a breach of the duty of fairness as the PRRA Officer's decision was made without the Officer being able to review all of the documentation submitted by the Applicants. The Applicants acknowledge that the Officer did not err in failing to consider their submissions, which were not before the Officer. Rather, they argue that the oversight by their former counsel resulted in prejudice to them and had the information been before the Officer, the Officer may have reached a different conclusion.

[14] The determination to be made by this Court is whether the *procedure* followed by the Officer was fair, having regard to all the circumstances. Here, the Officer had no knowledge of the supporting documents, which were not before them. Although former counsel attended the hearing, it does not appear that it was confirmed at the commencement of the hearing or thereafter that all submitted documents were before the Officer.

[15] Thus, the Officer did not breach the duty of procedural fairness owed to the Applicants. The question is whether, as a result of former counsel's failure to submit the omitted documents to the Officer, the Applicants have been denied a fair hearing and, in that context, procedural fairness.

[16] In support of their argument that it is unfair for this Court to let the Officer's decision stand in light of the documents they allege were inadvertently not submitted, the Applicants refer to *Sinnaia v Canada*, 2008 FC 1405 [*Sinnaia*]. That case involved an erroneous statement by former counsel which was directly relied on in rejecting a PRRA application when considering an internal flight alternative and was prejudicial to the applicant's position. Former counsel, as in the matter before me, filed an affidavit admitting to making an error. The respondent submitted that for there to be a violation of procedural fairness the applicant had to meet the test to establish incompetence. However, the applicant had not satisfied the test because they did not claim incompetence, rather that the error was a mistake. The Court held that "[t]he misstatement of crucial information because of a mix up of immigration files may be an honest mistake but it is not reasonable professional assistance" (at para 35). Although the Court concluded that a PRRA decision that is based on an erroneous statement of fact is unreasonable (at para 39), *Sinnaia* suggests that honest mistakes by counsel are issues of the effectiveness or competency of counsel.

[17] *Osagie v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1368 [*Osagie*] is also relied on by the Applicants. In *Osagie* the court was satisfied that various errors of counsel had the effect of denying the applicant natural justice because she had been denied the opportunity for a hearing. It noted that while the law was not always uniform in its application, it was clear that the negligent or incompetent actions of a solicitor may result in a party being denied a fair hearing (citing *Shirwa v Canada (Minister of Employment and Immigration)*, 1993 CanLII 17477 (FC) [*Shirwa*]; *Gulishvili v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1200).

[18] Similarly, *Shirwa* concerned a situation where the applicant's right to a fair hearing was denied because of the incompetence of counsel. The court held that incompetence of counsel in the context of a refugee hearing provides grounds for review of the tribunal's decision on the basis of a breach of natural justice. Further:

In other circumstances where a hearing does occur, the decision can only be reviewed in "extraordinary circumstances", where there is sufficient evidence to establish the "exact dimensions of the problem" and where the review is based on a "precise factual foundation." These latter limitations are necessary, in my opinion, to heed the concerns expressed by Justices MacGuigan and Rothstein that general dissatisfaction with the quality of representation freely chosen by the applicant should not provide grounds for judicial review of a negative decision. However, where the incompetence or negligence of the applicant's representative is sufficiently specific and clearly supported by the evidence such negligence or incompetence is inherently prejudicial to the applicant and will warrant overturning the decision, notwithstanding the lack of bad faith or absence of a failure to do anything on the part of the tribunal.

[19] In the present case, the Applicants had a hearing before the PRRA Officer and have not alleged incompetent counsel. Instead, they attribute the omission to inadvertence. Former counsel's affidavit states there was an inadvertent mistake as the zipped files were not uploaded due to (an unspecified) technical glitch that he was unaware of until the inquiry by current counsel.

[20] What I take from the above decisions is not, as the Applicants suggest, that inadvertence by former counsel is distinct from professional incompetence or inefficiency. Rather, it falls within that category if the applicable test is met.

[21] The Applicants provide no recent jurisprudence on point and makes no reference to this Court's *Amended Consolidated Practice Guidelines for Citizenship, Immigration and Refugee Protection Proceedings*, June 20, 2025 [*Guidelines*]. These address allegations against former counsel in immigration matters. Specifically, where an applicant alleges "professional incompetence, negligence, or other conduct on the part of his or her former legal counsel" as a ground for relief in an application for leave and judicial review under the *Immigration and Refugee Protection Act*, SC 2001, c 27, the *Guidelines* set out are to be followed.

[22] In *Bailey v Canada (Citizenship and Immigration)*, 2025 FC 1299 [*Bailey*] the applicant claimed that she was denied procedural fairness because her former counsel inadvertently failed to include key documents in support of her humanitarian and compassionate grounds application. Although this was the result of pure inadvertence and a misunderstanding between her first former counsel and her second former counsel, the applicant claimed that the result was that she was denied a full and fair opportunity to make her case. The applicant therefore raised competence of counsel on judicial review.

[23] Justice Pentney noted that the procedures for raising such claims are now set out in the *Guidelines*. The steps set out therein help to ensure that all relevant information is before the Court when an allegation is made against former counsel. It also provides procedural fairness to former counsel, whose competence is being called into question and whose professional reputation is therefore at stake (*Bailey* at para 16). The analysis itself proceeds in two stages. First, the applicant must establish that former counsel's conduct fell below the standards of professional competence (the performance component). Second, the applicant must demonstrate

that miscarriage of justice resulted from the lack of competent representation (the prejudice component).

[24] Justice Pentney noted that, in many cases, the focus of the second element is whether the party claiming incompetent representation has demonstrated that there is a reasonable probability that a different result would have been reached but for the inadequate representation, usually referred to as the “reliability of the result.” He held, however, that the test is whether a miscarriage of justice has occurred, and that this can simply involve a finding that the applicant was denied a fair opportunity to put forward their case (*Bailey* at paras 20-21). Justice Pentney was satisfied that the applicant in *Bailey* had demonstrated that former counsel’s conduct fell short of reasonably competent professional representation. Her second former counsel admitted that she inadvertently failed to submit the documents which provided information that was central to her claim:

[26] By any measure, it was counsel’s obligation to include these documents with the Applicant’s H&C application. Former counsel No. 2 does not claim that their omission from the package of materials was the result of any strategic choice. It appears to have been the product of inadvertence and miscommunication within the law firm. I find that former counsel’s failure to include them fell short of the standards of professional competence. I make this finding based on: the importance of the materials to central features of the Applicant’s H&C application, and the acknowledgement that former counsel had possession of them and had intended to include them in support of the Applicant’s H&C request, but did not do so through inadvertence and a failure to confirm with former counsel No. 1 that he had previously submitted them.

[25] Based on that analysis, Justice Pentney concluded that the applicant had established the performance component of the test. As to the prejudice component:

[28] On the second element of the test, the Applicant must establish that the failings of their former counsel resulted in a miscarriage of justice. On this point, Justice Norris provided the following helpful clarification in *Discua* at para 75:

Miscarriages of justice can take many forms in the context of ineffective assistance of counsel (GDB at para 28). This includes where former counsel's conduct has compromised the reliability of the result of the earlier proceeding and where former counsel's conduct has affected the fairness of the earlier proceeding (*ibid.*).

[26] Justice Pentney found that this second element of the test had also been established in *Bailey* and concluded:

[32] Whether the H&C Officer would have accepted this additional evidence as changing the outcome of the H&C decision case is irrelevant. What is relevant, however, is that but for former counsel's error, this evidence would have been before the Officer, who would have weighed it in their analysis of the Applicant's establishment in Canada and hardship upon return. Fairness dictates that the Applicant should have had the opportunity to have this evidence weighed by the Officer, regardless of the outcome.

[33] Based on this, I am persuaded that the Applicant has been denied procedural fairness. This is sufficient to quash the decision and remit it for reconsideration.

[27] In my view, based on *Bailey*, the proper approach in the circumstances of this matter would have been for the Applicants to have asserted ineffective assistance of counsel, thus engaging the *Guidelines*.

[28] In that regard, I note that the authorities relied upon by the Applicants all refer to the competency of counsel as the basis of the assertion of a denial of natural justice. Further, in *Zahid v Canada (Citizenship and Immigration)*, 2022 FC 214 [*Zahid*] the applicant argued that they suffered a violation of natural justice arising from a document not being produced before the RPD. The Court rejected this submission because the applicant had made a strategic decision not to file the document. Counsel for the applicant also suggested that in the event of an inadvertent or honest mistake there is no need to find that counsel was incompetent to argue violation of natural justice and that *Osagie* and *Sinnaia* supported that view. The Court expressed its doubts about the precedential value of these cases and stated that “[i]f they do not include the incompetence of counsel, it is difficult to see how on judicial review a superior court could intervene” (*Zahid* at para 24).

[29] That said, even though the *Guidelines* should have been followed, in these circumstances, the protocol they set out was complied with in substance (*Discua v Canada (Citizenship and Immigration)*, 2023 FC 137 at para 36; *Onwubiko v Canada (Citizenship and Immigration)*, 2025 FC 1314 at paras 30 -33). The required underlying analysis remains applicable. In that regard, former counsel in this case was notified of the concern and admitted by way of his affidavit that through inadvertence he failed to transmit the omitted documents. I find that the failure to submit the documents, although inadvertent, fell short of reasonably competent professional representation. There is also no explanation as to why the receipt of all submitted documents was not confirmed by counsel at the hearing. I also find that that the omitted documents were relevant and, by the Officer’s own reasoning, were significant to the central aspect of the claim of risk of persecution based on Daniel’s alleged sexuality.

[30] I acknowledge that the Officer's finding that Daniel was not credible was not limited to the lack of evidence regarding his same-sex relationship. The Officer also found his testimony given at the hearing about his relationship to be vague and general in nature. Although he was able to articulate in detail the purpose of the Black Computing Students Association and how it was a safe space for Black students, his responses to questions about his claimed sense of freedom and belonging since realizing his sexual orientation provided no similar level of detail. The Officer also found that Daniel's actual involvement with the LGBTQ community was inconsistent with his claimed sense of freedom and belonging.

[31] However, given the Officer's emphasis on the lack of information about Daniel's same-sex relationship, fairness required that the Applicants should have had the opportunity to have that evidence weighed by the Officer, regardless of the outcome, as found in *Bailey*.

[32] The Respondent submits that former counsel's affidavit does not adequately explain what transpired because it does not attach as exhibits the emails, with attached zipped files, that he says he received from the Applicants or his emails by which he sent the information to Officer (but which inadvertently omitted the zipped files). Nor do the affidavits filed by the Applicants in support of this application for judicial review provide, as exhibits, the emails with attachments that they say were sent to their former counsel. In the result, there is no evidence before me that the purportedly omitted evidence was sent to former counsel and that former counsel sent documents to the Officer but failed to attach certain documents.

[33] Why former counsel and the Applicants did not include this evidence is unexplained and the significance of this evidence should have been apparent. However, former counsel's affidavit does state that the omitted documents include a letter from Daniel's same-sex partner, his participation in recent LGBTQ events with his partner and other relevant supporting documents. The Applicants include information that they say comprises the omitted documents with the affidavit of the Principal Applicant. With respect to the Respondent's concern, I note that upon any reconsideration the Applicants will have to establish to the satisfaction of an officer that the evidence sent by the Applicants to former counsel, and which was received by former counsel but not forwarded to the Officer, is the same evidence.

[34] Finally, before leaving this argument, I would observe that at the hearing before me, Applicants' counsel confirmed that no request was made for a reconsideration by the Officer. While it is true that the Applicants were not compelled to seek reconsideration, to my mind, that would have been the appropriate course of action in these circumstances where the Applicants assert that they are not alleging professional incompetence but, rather, acknowledged inadvertence.

[35] As to the Applicants' other assertions of breach of procedural fairness, the Applicants also submit that the Officer breached the duty of procedural fairness by failing to apply the *Chairperson's Guidelines on Proceedings before the IRB Involving Sexual Orientation and Gender Identity Expression* [SOGIE Guidelines]. The Applicants submit that while the SOGIE Guidelines address trauma, they are also applicable in these circumstances because Daniel is from Nigeria, a country which has homophobic laws and a history of extreme violence towards

gay individuals. The Applicants go on to take issue with the Officer's expectations as to how Daniel should have behaved if his claim to be gay were to be believed, noting that the SOGIE Guidelines state "[m]embers should not expect a person appearing before the IRB to behave in a certain way when recounting traumatic experiences, and credibility findings should not be based on the absence or presence of such behaviours."

[36] I do not agree with the Applicants. First, there was no evidence that Daniel suffered any form of trauma related to his claim of risk or otherwise. Second, and in any event, the Officer states in the decision that in reviewing the evidence submitted by Daniel they took into consideration the SOGIE Guidelines. Noting, for example, that Daniel was given the opportunity to participate in the hearing alone or with his family present, that he was asked open-ended questions and that questions were rephrased and repeated when he was hesitant. I note that his former counsel also attended the hearing and, accordingly, had the opportunity to raise any concerns about the failure to consider or properly apply the SOGIE Guidelines.

[37] In my view, the Applicants are not really taking issue with whether the Officer applied the SOGIE Guidelines, which the Officer did, but are challenging how the SOGIE Guidelines were applied and the Officer's credibility findings. In that regard, the Applicants assert the Officer's expectations and assumptions regarding Daniel's sexual identity and relationship "go beyond reasonable inferences" and that the Officer engaged in speculation without an evidentiary basis for their findings and that this renders the decision unreasonable. This is a discrete issue from the argument that the Officer breached procedural fairness by failing to apply the SOGIE

Guidelines. The Applicants attempt to conflate the issues but have not established that the Officer breached procedural fairness by failing to apply the SOGIE Guidelines.

[38] Finally, the Applicants submit that the Officer breached procedural fairness by failing to advise them of the Officer's concerns at the PRRA hearing. Specifically, that the Officer did not ask Daniel's parents why no documentation supporting his claim of being gay had been provided. They submit that, had they been asked, it would have become apparent that the corroborating evidence provided by the Applicants to their former counsel was not before the Officer. The Applicants submit that this is required by section 11 of the *Refugee Protection Division Rules*, SOR/2012-256 [*RPD Rules*].

[39] I do not agree with the Applicants. The jurisprudence is clear that the onus is on applicants to ensure that sufficient, credible evidence is before the PRRA officer to support their claim for protection. The officer is obliged only to consider the evidence before them and is not required to solicit applicants for better or additional evidence or to advise the applicant of deficiencies in their application (see, for example, *Ritual v Canada (Citizenship and Immigration)*, 2021 FC 717 at para 40; *Ibrahim v Canada (Minister of Citizenship and Immigration)*, 2014 FC 837 at paras 27-29; *Ikeji v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1422 at para 50).

[40] Here the onus was on the Applicants to submit sufficient, credible evidence to establish, on a balance of probabilities, that they would be subject to a risk of prosecution if returned to Nigeria. The Officer's role was to weigh the evidence presented. The Applicants and their former

counsel would have been aware of the existence of the documentation now claimed to have been inadvertently omitted from their submissions and were in position to raise it during the hearing but did not do so. The Officer was not required to request additional evidence and a failure to do so does not result in a breach of procedural fairness. For the same reasons I do not agree with the Applicants' further submission that the Officer breached procedural fairness by failing to ask the Spouse about the current state of her or her mother-in-law's health.

Conclusion

[41] Given former counsel's acknowledged inadvertent failure to transmit evidence relevant to the Officer's credibility findings concerning Daniel's sexual orientation, the Applicants have been denied procedural fairness because they were denied the opportunity to have this evidence weighed by the Officer when making the PRRA decision. For that reason, the application must be granted. It is not necessary to address the Applicants' argument on the reasonableness of the decision.

JUDGMENT IN IMM-20420-24

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted;
2. The decision is set aside and the matter shall be remitted to a different officer for redetermination;
3. There shall be no order as to costs; and
4. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-20420-24

STYLE OF CAUSE: AYOBAMI SOLOMON POPOOLA, ABIDEMI
DEBORAH POPOOLA, AYOBAMI DANIEL
POPOOLA, OLUWAPAMILERIN ENOCH POPOOLA
(LITIGATION GUARDIAN OF) v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: BY VIDEONCONFERENCE USING ZOOM

DATE OF HEARING: OCTOBER 27, 2025

JUDGMENT AND REASONS: STRICKLAND J.

DATED: NOVEMBER 6, 2025

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