Federal Court  Cour fédérale

Date: 20211115

Docket: IMM-4225-20

Citation: 2021 FC 1227

Ottawa, Ontario, November 15, 2021

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

BABATUNDE ADEFULE
TITILAYO ADEYINKA ADEFULE
ENIOLA ADESEGUN ADEFULE
SUNLOLA GIGELOMO ADEFULE
TIMISOLA OLAIDE ADEFULE
IREPOOLA EZEKIEL ADEFULE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicants, a family from Nigeria, seek judicial review of a negative decision of the Refugee Appeal Division (RAD) dated August 18, 2020.

[2] For the reasons that follow, the application is dismissed.

II. **Background**

[3] The Principal Applicant, his spouse and three of their children are citizens of Nigeria. The fourth child was born in the United States of America and is thus a citizen of that country. It is not clear from the record whether that minor child is also a citizen of Nigeria.

[4] The adult members and three older minor children left Nigeria for the USA in August 2015. They remained there for two years before coming to Canada. While in the USA, the Principal Applicant consulted a lawyer to commence an asylum claim. The lawyer requested a substantial amount of money to initiate the claim which the Applicants could not afford. They decided to come to Canada upon learning of the new administration's anti-immigration policies.

[5] The family's claim was heard by the Refugee Protection Division (RPD) on September 25, 2018 and decided the same day. The RPD found that the Principal Applicant's claim, based on his bisexual orientation, was not credible and that neither he nor his family were Convention refugees or persons in need of protection. A claim on behalf of the youngest Applicant against the USA was not established.

[6] On appeal, the RAD found that the RPD had erred in parts of its analysis but concluded that those errors were not determinative. The RAD agreed that the Principal Applicant was not credible on central elements of his claim and had failed to establish a prospective fear of risk.

III. **Issues and Standard of Review**

[7] On this application for judicial review, the Applicants have raised numerous issues regarding the RAD decision including whether procedural fairness was breached.

[8] As a preliminary matter, the Applicants did not raise the procedural fairness issue until the eve of the hearing despite having had ample time prior to the due date for their Further Memorandum of Argument. The Respondent objected on the ground that they had not received adequate notice. At the hearing I indicated that I would consider whether the issue could be addressed after hearing all of the argument. In the result, I am satisfied that it must be dealt with.

[9] As noted above, it is not clear that the youngest child is also a citizen of Nigeria. He is described as such in the Applicants' Memorandum of Argument but the Principal Applicant testified before the RPD that no steps had been taken to obtain Nigerian citizenship for the child. On appeal it was argued that the RPD erred in not considering that his citizenship in the USA would entail separation from the rest of the family. The RAD found that no evidence had been submitted to show that the child would face a risk of persecution in the USA and that the risk of separation was speculative. I see no reason to interfere with that finding.

[10] In my view, the issues may be described as follows:

A. Did the RAD breach procedural fairness in considering the appeal?

B. Was the decision reasonable?

[11] The standard of review for allegations that a proceeding was not fair is commonly described as correctness: see for example *Mhlanga v Canada*, 2021 FC 957, at para 12-14. In essence, where an issue of procedural fairness arises, the Court must determine whether the process followed by the decision-maker satisfied the level of fairness required in all of the circumstances: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 43; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific*]). The ultimate question is whether the applicant knew the case to meet and had a full and fair chance to respond: *Canadian Pacific* at para 56.

[12] The presumptive standard for most other categories of questions on judicial review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 30. The reasonableness standard avoids undue interference with the administrative decision maker's discharge of its functions. While there are circumstances in which the presumption can be set aside, as discussed in *Vavilov*, none of them arises in the present case.

[13] To determine whether the decision is reasonable, 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). The party challenging the decision bears the burden of showing that it is unreasonable (*Vavilov* at para 100).

[14] Not all errors or concerns about a decision will warrant intervention. To intervene, the reviewing court must be satisfied that there are "sufficiently serious shortcomings" in the decision such that it does not exhibit sufficient justification, intelligibility and transparency. Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep". The problem must be sufficiently central or significant to render the decision unreasonable: *Vavilov*, at para 100; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, at para 33; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156, at para 36.

IV. **Analysis**

A. *Did the RAD breach procedural fairness in considering the appeal?*

[15] In considering the Applicants failure to claim in the USA, the RAD relied upon a June 2018 Response to Information Request (RIR) in the current National Documentation Package on the USA (USA NDP). The RIR contained information regarding the process for filing an asylum claim in the USA: notably that there is no filing fee and that applicants do not need a lawyer to seek asylum. The RAD concluded that the Applicants could have claimed asylum in the USA within their first year of arrival without paying any fees and that assistance was available from free or reduced cost lawyers and non-profit organizations. The RAD rejected the Applicants' submission that the high cost of seeking asylum in the USA through a lawyer was a legitimate explanation for their failure to claim while they were living there.

[16] The Applicants argue that the USA NDP was not before the RPD and thus they did not have the opportunity to address it. It was also not included as "additional" material in the Certified Tribunal Record (CTR). The Applicants submit that s 24(1) of the *Refugee Appeal Division Rules*, SOR/2012-257 (*RAD Rules)* was not respected, and that constitutes a breach of procedural fairness.

[17] Subsection 24(1) of the *RAD Rules* reads as follows:

Specialized Knowledge	**Connaissances spécialisées**
Notice to parties	**Avis aux parties**
24 (1) Before using any information or opinion that is within its specialized knowledge, the Division must notify the parties and give them an opportunity to,	**24 (1)** Avant d'utiliser des renseignements ou des opinions qui sont du ressort de sa spécialisation, la Section en avise les parties et leur donne la possibilité de faire ce qui suit :
(a) if a date for a hearing has not been fixed, make written representations on the reliability and use of the information or opinion and provide written evidence in support of their representations; and	**a)** présenter des observations écrites sur la fiabilité et l'utilisation du renseignement ou de l'opinion et transmettre des éléments de preuve par écrit à l'appui de leurs observations, si aucune date d'audience n'a été fixée;
(b) if a date for a hearing has been fixed, make oral or written representations on the reliability and use of the information or opinion and provide evidence in support of their representations.	**b)** présenter des observations oralement ou par écrit sur la fiabilité et l'utilisation du renseignement ou de l'opinion et transmettre des éléments de preuve à l'appui de leurs observations, si une date d'audience a été fixée.

[18] The Applicants rely on *Canada (Citizenship and Immigration) v Clerjeau*, 2020 FC 1120 [*Clerjeau*] in which the RAD had relied on its own knowledge of the sentencing range in Canada for the crime of robbery. The available sentence for that crime was the determinative issue in considering whether the applicant's conviction was for a serious non-political crime within the meaning of Article 1F(b) of the *Refugee Convention*. The record contained no evidence on that question. The Court concluded that the RAD should have notified the parties of its intention to rely on its knowledge of the sentencing range and given them an opportunity to make oral or written representations on the reliability and use of the information and to provide evidence in support of their representations.

[19] I agree with the Respondent that in the present matter, the issue is not the use of specialized knowledge but whether the USA NDP was extrinsic evidence which must be disclosed by the decision maker under the test established by the Federal Court of Appeal in *Mancia v Minister of Citizenship and Immigration* [1998] 3 F.C. 461; see also *Nadarajah v Canada (Minister of Citizenship and Immigration)*, (1999) 237 NR 15 (FCA) . Such documents must be disclosed only if they are novel and significant and demonstrate changes in general country conditions that may affect the decision and which is information the applicant could not reasonably have been expected to have knowledge of: *Ahmed v Canada (Public Safety and Emergency Preparedness*), 2018 FC 471 at para 27.

[20] Madame Justice Strickland recently considered the application of Rule 24 (1) in the context of an application for judicial review of a RAD decision in which it was argued that the RAD had improperly relied on undisclosed specialized knowledge: *Berhani v Canada*, 2021 FC

1007 [*Berhani*]. The information in question was contained in the National Documentation Package for Albania. At para 57 Justice Strickland concluded:

> …In my view, the RAD was not relying on specialized knowledge in making this finding. Its reasons reference the section of the National Documentation Package for Albania upon which it relied to support the statement as to widespread corruption. No breach of natural justice arises due to non-compliance with Rule 24(1)(b).

[21] In the present matter, I am similarly of the view that the RAD was not relying on specialized knowledge of the type discussed in *Clerjeau.* Specialized knowledge is knowledge accumulated over time as a result of a decision-maker's adjudicative functions. See for example, *Appau v Canada (Minister of Employment and Immigration),* [1995] FCJ No. 300 where the panel had relied on its own knowledge of Swiss border points and procedures.

[22] Here the information was available to the Applicants in the USA NDP and they were aware from the RPD's findings that their explanation for why they failed to claim asylum in the USA and delayed two years before coming to Canada would be at issue. The USA NDP was not extrinsic evidence as it was not novel or significant and did not reflect changes in the general country conditions that may affect the decision. The information about the asylum process in the USA was not information which the Applicants could not reasonably be expected to have knowledge of. They were represented by counsel at each stage of the proceedings and the RPD had found that the Applicants' failure to take advantage of the options available to them in the USA undermined their fear of persecution. The RAD was not required to give the Applicants notice that it would be referring to the NDP when it considered that question.

[23] The Applicants further contend that the RAD breached procedural fairness in raising the issue of credibility based on the Principal Applicant's hesitation in answering questions during the hearing before the RPD without giving the Applicants the opportunity to address the issue.

[24] This was not a pivotal new issue not raised by the RPD, unlike in the authorities cited by the Applicants: *Ugbekile v Canada (Minister of Citizenship and Immigration*), 2016 FC 1397 [*Ugbekile*], paras 21-22 and *Fu v Canada*, 2017 FC 1074 [*Fu*] para 14. In *Ugbekile* the RAD raised the issue after listening to the recording of the RPD hearing whereas the RPD had made no credibility finding. In *Fu* the RAD made several credibility determinations not raised by the RPD and which the applicants did not have an opportunity to address. Similarly, in *He v Canada (Citizenship and Immigration),* 2019 FC 1316 [*He*] at para 80, the Court held that the evidence reviewed by the RAD was not central to the RPD decision and it could not therefore be assumed that the Applicants knew the case to be met on appeal.

[25] Here, the lack of credibility of the Applicants' testimony was one of the determinative findings by the RPD. The RPD panel found inconsistencies in the Principle Applicant's testimony and questioned him about them during his evidence. This was not a new issue and the RAD did not have an obligation to give notice that it would be considered: *Al-Hafidhi v Canada (Citizenship and Immigration),* 2018 FC 315, at paragraph 37.

[26] It has been established in numerous cases that "[t]here is no procedural fairness issue when the RAD finds an additional basis to question the Applicant's credibility using the evidentiary record before the RPD" (*Oluwaseyi Adeoye v Canada (Citizenship and Immigration),*

2018 FC 246, at para 13; *Akram v Canada (Citizenship and Immigration)*, 2020 FC 143 at para 17; *Fatime v Canada (Citizenship and Immigration)*, 2020 FC 594 at para 25). In *Farah v Canada (Citizenship and Immigration)*, 2021 FC 116 Justice Shore stated the following at para 16:

> "…it is well established that where credibility is already in issue, an additional basis with respect to that credibility does not constitute a new issue giving rise to a right to be given notice and an opportunity to respond (*Yimer v Canada (Citizenship and Immigration)*, 2019 FC 1335 at para 17 [*Yimer*]; *Corvil v Canada (Citizenship and Immigration)*, 2019 FC 300 at para 13)."

[27] In my view, there was no breach of procedural fairness by the RAD.

B. *Was the decision reasonable?*

[28] The Applicants argue that the RAD conducted a microscopic examination of the evidence and did not follow the *Chairperson's Guidelines regarding Sexual Orientation and Gender Identity and Expression* [SOGIE] in failing to consider whether the vagueness and lack of detail in the evidence of the Principal Applicant's same sex relationships may be explained by cultural or psychological barriers. In that regard, the Applicants contend that the RAD failed to give reasonable weight to a psychotherapist's assessment report regarding the Principal Applicant's loss of memory.

[29] The Respondent argues that the SOGIE does not need to be specifically mentioned when it is considered, that "Guidelines are not a cure for every evidentiary deficiency" and that a psychotherapist assessment report cannot be considered a "cure-all" for deficiencies in the

manner in which an applicant presents a refugee claim: *Moffat v Canada (Citizenship and Immigration*), 2019 FC 896 [2019] 4 FCR 331, at para 18; *Okunowo v Canada (Citizenship and Immigration*), 2020 FC 175, at para 66.

[30] I agree with the Applicants that the RAD placed undue emphasis on the inability of the Principal Applicant to remember the correct year when he had begun what he said was a five-year relationship with another male in Nigeria. He did recall the year and month when the relationship ended which should have been sufficient to resolve that question. But this unreasonable finding by the RAD does not outweigh all of the other negative credibility findings to render the overall decision unreasonable.

[31] For example, the Principal Applicant did not include a same-sex relationship in the USA in his Basis of Claim document. At first he testified that he had forgotten to include this information. He then stated that he had not wanted to upset his wife. This was considered to be unreasonable given that the Applicants had disclosed a photo that purported to be of the Principal Applicant and his same-sex partner in bed together in the USA in 2017. It undermines his claim that he had sought to conceal his relationship from family members. The SOGIE is not, as the Respondent argues, a cure-all and decision makers may draw negative inferences from material inconsistencies or contradictions in the evidence that have no reasonable explanation.

[32] As for the psychotherapist's assessment, it was used for one purpose and that was to assist the RPD panel to be sensitive in its questioning and to provide breaks as needed. The RAD reasonably found that this was done and that the report was unable to redeem the problems with

the Principal Applicant's evidence. The psychotherapist was not able to express an opinion on the credibility of the Applicants' claim itself: *Kaur v Canada (Citizenship and Immigration)*, 2012 FC 1379, at para 37.

[33] The main difficulty with the Applicants' evidence was the inherent lack of plausibility in the Principal Applicant's account of events in Nigeria and the USA. The RAD reasonably found on a balance of probabilities that the principal Applicant was never outed as bisexual in Nigeria as claimed, that he never had a same-sex relationship in the USA and that the credibility of his subjective fear was weakened by his failure to claim asylum in the USA during his two-year sojourn in that country. The fact that he consulted one lawyer was not doubted. But he then did nothing further to find other solutions in order to protect himself and his family. The absence of any such effort undermined his credibility and the family's claim for protection.

V. **Conclusion**

[34] I am satisfied that the RAD did not breach its duty of procedural fairness as it was under no obligation to notify the Applicants of its concerns if no issue had arisen. The RAD did not err in its credibility findings as there were inconsistencies in the Applicants' testimony and documentary evidence. The RAD conducted an independent analysis, applied the correct appellate standard and properly considered the Applicants' claims. The panel provided justified, intelligible and transparent reasons for its conclusion. While it made one unreasonable finding, that error was not central to its decision and is insufficient for this Court to interfere.

[35] The parties when given the opportunity at the hearing indicated that there were no serious questions of general importance to propose for certification. I agree.

JUDGMENT IN IMM-4225-20

THIS COURT'S JUDGMENT is that the application is dismissed. No questions are certified.

" Richard G. Mosley "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4225-20
STYLE OF CAUSE:	BABATUNDE ADEFULE TITILAYO ADEYINKA ADEFULE ENIOLA ADESEGUN ADEFULE SUNLOLA GIGELOMO ADEFULE TIMISOLA OLAIDE ADEFULE IREPOOLA EZEKIEL ADEFULE v THE MINISTER OF CITIZENSHIP AND IMMIGRAITON
PLACE OF HEARING:	HEARD VIA VIDEOCONFERENCE TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 12, 2021
JUDGMENT AND REASONS:	MOSLEY J.
DATED:	NOVEMBER 15, 2021

APPEARANCES:

Jeffrey L. Goldman	FOR THE APPLICANTS
Christopher Ezrin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT