

Federal Court



Cour fédérale

Date: 20220419

Docket: IMM-2312-21

Citation: 2022 FC 555

Ottawa, Ontario, April 19, 2022

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

**AYOBAMI SOLOMON POPOOLA,
ABIDEMI DEBORAH POPOOLA,
OLUWAPAMILERIN ENOCH POPOOLA,
AND AYOBAMI DANIEL POPOOLA**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ayobami Solomon Popoola, the Principal Applicant, his spouse and their two minor children, the Associate Applicants, are citizens of Nigeria. They sought refugee protection in Canada because of 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. Their home was broken into more than once and items were stolen, including cellphones, laptops and other valuables. The Applicants allege being at home in at least one instance and they were threatened during the break-in. As well, the children were contacted at their school by individuals attempting to persuade children to leave with them. The Nigerian police were contacted. The police offered little assistance, however, except advice to flee the city of Ado Ekiti where the Applicants lived at the time.

[2] They sought shelter first in Lagos but received threatening calls there. They next fled to Ibadan to stay with family members but they continued to be harassed and threatened by the syndicate. Fearing for their safety, the Applicants left for the United States of America but eventually decided to seek asylum in Canada instead.

[3] The Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] of Canada rejected the Applicants' claims. The Refugee Appeal Division [RAD] upheld the RPD decision. Credibility was the determinative issue for the RPD and the RAD, with both tribunals concluding that the Applicants are neither Convention refugees, nor persons in need of protection, pursuant to section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[4] The Applicants seek judicial review of the RAD decision raising the issues of reasonableness and breaches of procedural fairness.

[5] I am satisfied that the RAD decision was not unreasonable and that procedural fairness was not breached as alleged. For the reasons below, I thus dismiss this application for judicial review.

II. Standard of Review

[6] The presumptive standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 10. To avoid judicial intervention, the decision also must bear the hallmarks of reasonableness – justification, transparency and intelligibility: *Vavilov*, at para 99. The party challenging the decision has the onus of demonstrating that the decision is unreasonable: *Vavilov*, at para 100.

[7] Breaches of procedural fairness in administrative contexts have been considered subject to a “reviewing exercise ... ‘best reflected in the correctness standard’ even though, strictly speaking, no standard of review is being applied”: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54. The duty of procedural fairness is context-specific, flexible and variable: *Vavilov*, above at para 77. In sum, the focus of the reviewing court is whether the process was fair and just.

III. Analysis

(1) Reasonableness

[8] I am not persuaded that the RAD decision was unreasonable. The following principles apply to the Court's consideration of this issue.

[9] Judicial review is not an appeal and is not a "do-over": *Agbeja v Canada (Citizenship and Immigration)*, 2020 FC 781 at para 22. The reviewing court must refrain from reweighing and reassessing the evidence before the decision maker: *Vavilov*, above at para 125. Bearing in mind that reasonableness review also is not a "line-by-line treasure hunt for error," the reviewing court simply must be satisfied that the decision maker's reasons "add up": *Vavilov*, at paras 102 and 104.

[10] Contrary to the Applicants' submissions, the presumption of an applicant's truthfulness in respect of sworn allegations is rebuttable: *Maldonado v Canada (Minister of Employment and Immigration)*, 1979 CarswellNat 168 at para 5, [1980] 2 FC 302 (FCA). An applicant's lack of credibility may be sufficient to displace the presumption, where, for example, the evidence is inconsistent with the applicant's sworn testimony or where the decision maker is not satisfied with the applicant's explanation for the inconsistencies: *Lin v Canada (Citizenship and Immigration)*, 2010 FC 183 at para 19; *Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 at para 21.

[11] Further, where the decision maker determines that a claimant lacks credibility, that determination is sufficient to dispose of the claim unless there is independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim; the onus is on the claimant to demonstrate there was such evidence: *Canada (Citizenship and*

Immigration) v Sellan, 2008 FCA 381 at para 3; *Pathmanathan v Canada (Citizenship and Immigration)*, 2012 FC 519 at paras 52-57; *Tang v Canada (Citizenship and Immigration)*, 2019 FC 1478 at para 31.

[12] In the case before me, the RAD's assessment of the evidence did not turn up such independent and credible documentary evidence. The presumption of truthfulness was rebutted by the RAD's determinations that the Applicants did not furnish evidence supporting their claim regarding the alleged fraudulent bank loans, and, as the Respondent notes, they did not provide a credible explanation for not obtaining such documents.

[13] The uncontested finding that the Principal Applicant had not provided, for example, the report he allegedly authored which named the agents of persecution goes to the heart of the claim: *Garcia Serrano v Canada (Citizenship and Immigration)*, 2022 FC 153 at para 23-26. Coupled with the inconsistencies in the Applicants' testimony about obtaining police records through his relative, which was contradicted in the national documentation package [NDP] evidence, this reasonably led in my view to a negative credibility finding that affected the Applicant's overall credibility: *Udemba v Canada (Citizenship and Immigration)*, 2021 FC 1215 at para 20.

[14] More specifically, the Applicants disagree with the RAD's interpretation of the "authorization" required for a third person to obtain a copy of a police report on behalf of the person to whom they initially were issued, and they rely on substantially the same arguments presented to the RAD on this issue. In the circumstances here, I find this strategy is little more

than a request to reweigh the evidence before the RAD, which is not the role of the Court on judicial review.

[15] That the NDP evidence considered by the RAD regarding the required authorization may be open to more than one interpretation does not mean that the RAD's interpretation was unreasonable, and I am not persuaded that it was. The possibility of a decision maker drawing alternative inferences from, or adopting alternative interpretations of, the evidence before it, does not render the RAD's inferences or interpretations unreasonable; this Court will defer to any reasonable inference or interpretation made by a decision make, even if other inferences or interpretations can be made: *Thanaratnam v Canada (Minister of Citizenship & Immigration)*, 2005 FCA 122 at para 34; *Solis Mendoza v Canada (Citizenship and Immigration)*, 2021 FC 203 at para 43; *Zhou v Canada (Citizenship and Immigration)*, 2020 FC 676 at para 21; *Krishnapillai v Canada (Minister of Citizenship & Immigration)*, 2007 FC 563 at para 11; *Oria-Arebun* 2019 FC 1457 at para 26.

[16] I find that the RAD's reasons here demonstrate, on the whole, "an internally coherent and rational chain of analysis in relation to the facts" that "add up" and, thus, are deserving of deference: *Vavilov*, above at paras 85 and 104.

(2) Procedural Fairness

[17] I am satisfied that procedural fairness was not breached in the applicable circumstances. The Applicants' complaint in this regard is two-fold.

[18] First, the Applicants submit that the failure of the RPD to produce a complete recording of the hearing constitutes a denial of natural justice, and that in the circumstances the RAD should have ordered an oral hearing or re-hearing of the case. Second, the Applicants assert that the RAD engaged in a voyage of its own into the record, raising new credibility issues in respect of which the Applicants should have been given notice or an opportunity to respond. I deal with these issues in turn below.

[19] Before doing so, however, I note that in the absence of any new evidence before the RAD, as was the case here, the RAD was constrained under the *IRPA* s 110 in its ability to hold a hearing: *Tota v Canada (Citizenship and Immigration)*, 2015 FC 890 at para 32. Further, even in a case where there is new evidence, the RAD's ability to accept it and to hold a hearing is discretionary.

(a) *Incomplete Recording of RPD Hearing*

[20] I am satisfied that the RAD did not err in its treatment of the two transcripts of the RPD hearing prepared in connection with this matter.

[21] In its decision, the RAD acknowledges that there are two transcripts at play, one produced by the IRB and the other produced by the Applicants, but both prepared from the same audio recording which, I note, also has been provided to the Court. In addition, both transcripts are contained in the certified tribunal record [CTR] in evidence in this proceeding.

[22] The Applicants assert that the RPD did not provide a complete recording of the hearing, in that there are gaps in the recording and transcript. According to the Applicants, the audio recording was particularly inaudible in parts where the RPD drew negative credibility inferences. They did not point, however, either in their written or oral submissions before the Court to any specific examples. That said, the Applicants did provide examples in their memorandum of arguments filed with the RAD based on the transcript that they produced, as also acknowledged by the RAD.

[23] The RAD indicates that it did not undertake a “side by side” comparison of the two transcripts but that it did consider the examples provided in the Applicants’ memorandum and it listened to the audio recording. According to the RAD, inaudibility occurred, not with respect to exchanges of any great length, but rather only infrequently with respect to the odd word or two resulting in a minor inconvenience. The RAD states that it had no difficulty comprehending the evidence and gave full consideration to the Applicants’ testimony.

[24] Having also considered the transcripts and the audio recording, I am not persuaded that the RAD breached natural justice. There is little evidence of how the transcriptionist prepared the Applicants’ transcript; she declared only that she did so to the best of her ability. Further, a side-by-side comparison of excerpts from the transcripts – using the examples provided in the Applicants’ memorandum to the RAD – demonstrates, to the Court’s satisfaction, that there were far fewer gaps in the audio recording and IRB’s transcript, amounting to a word or two periodically. For example, in the exchange between the RAD Member and the Principal Applicant regarding who was named in report as having committed the fraud or been involved in

the fraudulent loans, both transcripts disclose that the exchange was about this very information, including specific names.

[25] Further, by the time of the hearing before the Court, the Applicants had access for about four months to the IRB's transcript contained in the CTR and could have pointed the Court, in their submissions, to specific examples where the gaps in the IRB's transcript impacted the RAD's credibility findings. I agree with the Respondent that the onus was on the Applicants to do so.

[26] I do not disagree with the Applicants that the lack of a complete record of a witness' testimony where credibility is in issue could be of particular concern: *Patel v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 804 [*Patel*] at para 33. That said, a contention that the incompleteness of the record of the proceeding under review violates the rules of natural justice will succeed only if the record before the reviewing court is insufficient to permit it to dispose of a potential ground of review properly: *Patel*, at para 34. To expand regarding the Applicants' onus mentioned above, in my view it was for the Applicants to show in the circumstances that the gaps in the official record, rather than a version they produced themselves, preclude the Court from assessing the reasonableness of the RAD's specific negative credibility findings, and I find they have not done so.

[27] Further, this Court previously has held that even in circumstances where no transcript is available, the Court still can dispose of an application for judicial review properly: *Cletus v Canada (Citizenship and Immigration)*, 2008 FC 1378 [*Cletus*] at para 24. The matter before me,

however, is not a case where there was a complete lack of a transcript or recording of the hearing which the RAD could consider. Given the availability of the IRB's transcript, as well as the audio recording of the hearing, and considering the inaudible portions are minimal in nature and often are illuminated by follow-up questions from the RPD, this is not, in my view, a case where the record does not permit this Court to determine whether the RAD's findings are reasonable on the evidence before it or, I add, whether a breach of natural justice occurred: *Cletus*, at paras 24-25.

(b) *New Credibility Issues*

[28] I am not persuaded that the RAD erred in raising two additional credibility issues.

[29] The RAD admitted considering other aspects of the Applicants' testimony not included in the RPD decision that in the RAD's view impacted credibility. The RAD points, however, to this Court's jurisprudence supporting the RAD's ability to make independent credibility findings where credibility was an issue before the RPD: *Sary v Canada (Citizenship and Immigration)*, 2016 FC 178 at para 31.

[30] Even if I am incorrect and it was an error for the RAD to consider the two additional credibility concerns it raised (regarding the Applicants' US visas and the alleged presence of a neighbour during a break-in at their home), not every flaw or shortcoming in a decision will render it unreasonable as a whole or, I add, constitute a breach of procedural fairness: *Metallo v Canada (Citizenship and Immigration)*, 2021 FC 575 at para 26; *Mebrahtu v Canada*

(Citizenship and Immigration), 2022 FC 279 at para 37, citing *Lin v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1235 at paras 59-60.

[31] Given the myriad of the RAD's credibility findings here, I am satisfied that the RAD did not breach procedural fairness; credibility squarely was in issue before the RPD and on appeal, and further, as I found above, the RAD decision was not unreasonable on the whole.

IV. Conclusion

[32] For the above reasons, I therefore dismiss the Applicants' judicial review application.

[33] No party proposed a serious question of general importance for certification and I find that none arises in the circumstances.

JUDGMENT in IMM-2312-21

THIS COURT'S JUDGMENT is that: the Applicants' application for judicial review is dismissed and there is no question for certification.

"Janet M. Fuhrer"

Judge

Annex “A”: Relevant Provisions

Immigration and Refugee Protection Act, SC 2001, c 27
Loi sur l’immigration et la protection des réfugiés, LC 2001, ch 27

<p>Convention refugee</p> <p>96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,</p> <p style="padding-left: 40px;">(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or</p> <p style="padding-left: 40px;">(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.</p>	<p>Définition de réfugié</p> <p>96 A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d’être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :</p> <p style="padding-left: 40px;">a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;</p> <p style="padding-left: 40px;">b) soit, si elle n’a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.</p>
<p>Person in need of protection</p> <p>97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally</p> <p style="padding-left: 40px;">(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or</p> <p style="padding-left: 40px;">(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if</p> <p style="padding-left: 80px;">(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,</p> <p style="padding-left: 80px;">(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,</p>	<p>Personne à protéger</p> <p>97 (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n’a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :</p> <p style="padding-left: 40px;">a) soit au risque, s’il y a des motifs sérieux de le croire, d’être soumise à la torture au sens de l’article premier de la Convention contre la torture;</p> <p style="padding-left: 40px;">b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :</p> <p style="padding-left: 80px;">(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,</p> <p style="padding-left: 80px;">(ii) elle y est exposée en tout lieu de ce pays alors que d’autres personnes originaires de ce pays ou qui s’y trouvent ne le sont généralement pas,</p>

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

Person in need of protection

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Personne à protéger

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

Appeal

Procedure

110 (3) Subject to subsections (3.1), (4) and (6), the Refugee Appeal Division must proceed without a hearing, on the basis of the record of the proceedings of the Refugee Protection Division, and may accept documentary evidence and written submissions from the Minister and the person who is the subject of the appeal and, in the case of a matter that is conducted before a panel of three members, written submissions from a representative or agent of the United Nations High Commissioner for Refugees and any other person described in the rules of the Board.

Hearing

(6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)

- (a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;
- (b) that is central to the decision with respect to the refugee protection claim; and

Appel

Fonctionnement

110 (3) Sous réserve des paragraphes (3.1), (4) et (6), la section procède sans tenir d'audience en se fondant sur le dossier de la Section de la protection des réfugiés, mais peut recevoir des éléments de preuve documentaire et des observations écrites du ministre et de la personne en cause ainsi que, s'agissant d'une affaire tenue devant un tribunal constitué de trois commissaires, des observations écrites du représentant ou mandataire du Haut Commissariat des Nations Unies pour les réfugiés et de toute autre personne visée par les règles de la Commission.

Audience

(6) La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois :

- a) soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;
- b) sont essentiels pour la prise de la décision relative à la demande d'asile;

(c) that, if accepted, would justify allowing or rejecting the refugee protection claim.

c) à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2312-21

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DATED: APRIL 19, 2022

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