Federal Court  Cour fédérale

Date: 20221101

Docket: IMM-2877-20

Citation: 2022 FC 1493

Toronto, Ontario, November 01, 2022

PRESENT: Justice Andrew D. Little

BETWEEN:

NGOZI JESSICA OBODO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] On June 14, 2020, the applicant and her two children attempted to make a claim for refugee protection at the Canadian port of entry at Rainbow Bridge, Niagara Falls.

[2] Canada Border Services Agency ("CBSA") officials found that she was ineligible to have her claim referred to the Refugee Protection Division ("RPD") under paragraph 101(1)(*e*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the *"IRPA"*). CBSA concluded that the applicant did not have a family member in Canada as she claimed. Her attempt to enter Canada

therefore did not meet the requirements for the non-application of paragraph 101(1)(e) found in paragraph 159.5(*b*) of the *Immigration and Refugee Protection Regulations* (the *"IRPR"*).

[3] A CBSA officer wrote a report under *IRPA* subsection 44(1) and a delegate of the Minister made an Exclusion Order against the applicant under *IRPA* subsection 44(2).

[4] The applicant filed an application for judicial review of the decision to issue an Exclusion Order. She submitted that the decision should be set aside because it was unreasonable. She also argued that she was not afforded procedural fairness. She claimed that she and her children were mistreated at the border in a manner that gave rise to a reasonable apprehension of bias and that she was deprived of her right to counsel.

[5] For the reasons below, the application is dismissed. Applying the principles in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653, I find no basis to interfere with the decision to issue an Exclusion Order. In addition, the evidence does not demonstrate procedural unfairness, including a reasonable apprehension of bias or a denial of a right to counsel.

I. Facts and Events Leading to this Application

[6] The applicant is a citizen of Nigeria. Her children are citizens of the United States of America.

[7] On June 14, 2020, the applicant and her children arrived at the port of entry at Rainbow Bridge and she made a request for refugee protection. At that time, the applicant's son was

almost four years old and her daughter was nearly two. The applicant advised that her son was on the autism spectrum.

[8] Because she was seeking to enter Canada from the United States, certain provisions of the *IRPR* applied to her attempt to claim refugee protection, which implemented the *Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries,* sometimes called the Safe Third Country Agreement. The applicant claimed that she had a family member who was a permanent resident in Canada, namely a half-sister named Vera. If that were the case, paragraph 101(1)(*e*) of the *IRPA* would not apply to the applicant's request to enter Canada, owing to paragraph 159.5(*b*) of the *IRPR*.

[9] The following is a summary of events at the border and the contents of certain documents material to this application. I have compiled the chronology from various sources in the application record and the Certified Tribunal Record.

[10] The events in question occurred over a period of between 24 and 30 hours, on June 14 and 15, 2020. The applicant arrived at the border in the early afternoon of June 14. She returned to the United States with her children sometime soon after 6 p.m. the next day.

[11] On arrival at the port of entry, the applicant spoke from her vehicle to a CBSA officer and asked to claim refugee protection. She was directed to park her vehicle. Soon after, the applicant presented copies of the following documents to CBSA:

a) a document purporting to be her Nigerian birth certificate;

b) Vera's birth certificate;

c) Vera's permanent resident card;

d) an attestation of birth for Vera from the National Population Commission of Nigeria; and

e) various other documents including a colour photocopy of the passport bio page of her Nigerian passport, a divorce certificate from her wife in the USA, vehicle ownership papers, and her children's US passports and US birth certificates.

[12] The applicant did not present a Nigerian passport.

[13] Around the time she arrived at the port of entry, it appears that the applicant's alleged half-sisters, Vera and Harriet, were waiting for her on the Canadian side. They provided food to the applicant and her children around mid-afternoon.

[14] At approximately 4 p.m., a CBSA officer interviewed the applicant.

[15] The officer prepared a statutory declaration dated June 14, 2020, which included the questions posed to the applicant and her answers. According to the declaration, the applicant advised that she was a citizen of Nigeria and no other country. The applicant's purported birth certificate was the only document tendered to show her identity. The applicant advised the officer that Vera was her half-sister and that they shared the same father. The declaration noted that towards the end of 2017, the applicant's mother told her about additional siblings. At that time, she learned about Vera, who was living in Port Harcourt, Nigeria. Asked if she decided to find her half-sister Vera, the applicant advised that she was able to locate Vera. They started communicating from the end of 2017. The applicant advised the officer that her mother asked

around and was able to get Vera's number. Vera helped her to get in touch with the rest of her siblings. After she met Vera, she also met another alleged half-sister named Harriet.

[16] In addition, the applicant advised the officer that she had no status in the United States at that time.

[17] The officer also prepared a typewritten document dated June 14, 2020 entitled "Examining Officer's Notes". In these notes, the officer set out background information about the applicant, including her multiple entries into the United States, births of her children, her marriage and divorce in the United States, existing removal proceedings against her in the United States (during which her passport was seized by US officials).

[18] During the interview, the applicant identified the names of her siblings. She identified Vera and Harriet as her half-sisters who were in Canada and that all shared the same biological father. The officer noted that even though the applicant provided a copy of Vera's permanent resident card, she "was unable to recall what Vera's married name was and incorrect[ly] stated her date of birth".

[19] The officer's notes stated that given the timeline of the applicant's travel, marriage, child birth and inconsistencies in her statements, the officer took a closer look at the applicant's birth certificate.

[20] The officer identified a number of issues suggesting that the applicant's birth certificate was not authentic. The officer noted that the birth certificate was dated April 28, 1985 and confirmed the birth of the applicant on March 26, 1985. However, the officer found it was

evident on examination of the document that it was not issued over 30 years before and nothing indicated it was a reprint or photocopy. The Nigerian government official purporting to sign the 1985 birth certificate was a current government leader in Nigeria who had been in power since 2013. The officer also noted that Delta State in Nigeria was formed on August 27, 1991 from a previous colony known as Bendel State; thus on March 26, 1985, the Delta State and the Delta State government did not exist.

[21] The officer questioned the applicant about the authenticity of the birth certificate. The applicant told the officer that her mother obtained it for her and told her it was authentic.

[22] The officer also made efforts to gather evidence with respect to the applicant's claim that she was biologically related to a family member in Canada, by contacting Vera and the applicant's mother. The officer's notes stated that Vera was contacted three times requesting more documentation showing proof of her relationship with the applicant. According to these notes, each time Vera was contacted she requested that the officer call back in an hour and she would advise what she had available at the time or how much more time she would need to acquire the documents. The notes also advised that the applicant's mother "was contacted but declined to answer any questions".

[23] The officer found that "no evidence was available to show there to be a biological relationship with anyone in Canada". The officer was of the opinion that the applicant and her children failed to establish that they met an exception to the Safe Third Country Agreement, namely, having a family member in Canada. The officer therefore recommended that they be found ineligible to have a refugee protection claim referred to the RPD.

[24] The officer issued a report under subsection 44(1) of the *IRPA* that the applicant was a foreign national who has not been authorized to enter Canada and was, in the officer's opinion, inadmissible pursuant to *IRPA* paragraph 41(*a*) for failing to comply with *IRPA* paragraph 20(1)(*a*) and section 6 of the *IRPR*.[1] The officer issued similar reports for the two children.

[25] According to Vera's affidavit filed on this application, an officer telephoned her at approximately 10 p.m. on June 14. The officer told her that the applicant's birth certificate was fake. Vera testified that she advised the officer that she would obtain an attestation of birth for the applicant from government offices in Nigeria. Vera's affidavit advised that she obtained it the next day and attempted to fax it to the CBSA early the next afternoon.

[26] On the morning of June 15, the Minister's Delegate ("MD") commenced work on the matter.

[27] The MD prepared a document dated June 15, 2020 entitled "Minister's Delegate Review and Determination". That document set out the background, including that the officer found probable grounds to believe that the applicant's birth certificate was "counterfeit" and noted the flaws in it as identified by the officer. The MD noted that the birth certificate contained a typographical error, specifically "REGISTRSR OF BIRTH".

[28] The MD described the contents of her "lengthy" telephone conversation with Vera, which occurred while the applicant and her children were sleeping. The MD found that the applicant and Vera told her different stories about how they had originally discovered that they were half

[1] The applicant did not challenge the applicability of the *IRPA* or *IRPR* provisions cited by the officer or the MD.

sisters and who first called whom: Vera stated that she got the applicant's phone number and called her to confirm their familial relationship, whereas the applicant told the MD that she was the one to communicate first with Vera after learning from her mother that she had six half-siblings. Vera's affidavit on this application stated that she advised the MD that she was attempting to obtain an attestation of birth for the applicant.

[29] The MD decided that it was more probable than not that the applicant did not meet an exception to the Safe Third Country Agreement by having a family member in Canada. Therefore, the MD found her ineligible to have her case referred to the RPD.

[30] The MD prepared a declaration setting out the questions posed to the applicant and her answers.

[31] The MD issued a letter dated June 15, 2020, advising that a decision had been made under *IRPA* subsection 100(1), and the applicant's claim for refugee protection had been determined to be ineligible to be referred to the RPD due to paragraph 101(1)(*e*) of the *IRPA*.

[32] The MD issued an Exclusion Order dated June 15, 2020. The Exclusion Order stated that, pursuant to section 228 of the *IRPR*, the MD was satisfied that the applicant was a foreign national described under *IRPA* paragraph 41(*a*) who there were reasonable grounds to believe was inadmissible for failing to comply with paragraph 20(1)(*a*) of the *IRPA*. The applicant's signature appeared on the Exclusion Order acknowledging receipt of a copy on June 15, 2020.

[33] At approximately 4 p.m. on June 15, the applicant and her children were driving away from the port of entry back into the United States when the applicant stopped her car. According

to the applicant, she had a panic attack and could no longer drive. According to the MD's notes, the applicant "abruptly stopped her vehicle and proceeded to refuse to continue returning to the United States". The MD's notes stated that the applicant "was spoken to at length about the consequences of not returning on her own accord as she was under removal and was excluded from Canada". She began to hyperventilate and was in need of medical care.

[34] The applicant was transported to hospital by ambulance. While she was receiving medical care, the applicant's children were separated from her but were in the care of the Acting Chief and a Superintendent of CBSA at the port of entry.

[35] At approximately 6:10 p.m., the applicant was released from hospital. CBSA placed her under arrest, apparently briefly, in order to complete the removal process.

[36] At the end of these events, she withdrew her and her children's requests to enter Canada.

II. Admissibility of New Evidence on this Application

[37] Both parties sought to file new evidence on this judicial review application. The applicant filed three affidavits to support her application for leave and for judicial review. She filed her own detailed affidavit setting out her recollection of the events at the port of entry. In addition, both Vera and the applicant's mother provided affidavits in the Application Record filed in February 2021.

[38] In January 2022, after this Court had granted leave under *IRPA* section 72, the respondent filed an affidavit from the MD and a short affidavit from a supervisor of the officer advising that

the officer was on “authorized leave” until September 2022 (to explain why the officer did not provide an affidavit on this application).

[39] In February 2022, the applicant filed a further affidavit of her own and an affidavit from a person in her counsel’s office attaching the results of DNA tests done in February/March 2021. There were three DNA tests. One compared the DNA of the applicant and her alleged half-sister Vera. Another compared the applicant’s DNA with her alleged half-sister Harriet. The third compared the DNA of Harriet and Vera.

[40] Neither party made any objection to the other party’s new evidence. The applicant made submissions about the admissibility of her five affidavits based on the legal test for new evidence on appeal. The respondent made no submission concerning the admissibility of the two responding affidavits, perhaps understandably given that they responded, partially, to the new evidence from the applicant. In addition, the respondent sought to use the DNA evidence to argue that this application for judicial review should be dismissed because the result was inevitable.

[41] On a judicial review, the general rule is that the evidentiary record before the reviewing court is restricted to the evidentiary record that was before the administrative decision-maker. Evidence that was not before the decision-maker and that goes to the merits of the matter is not admissible on an application for judicial review in this Court: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, at para 19; *Delios v Canada (Attorney General)*, 2015 FCA 117, at para 42; *Perez v Hull*, 2019

FCA 238, at para 16, citing *Sharma v Canada (Attorney General)*, 2018 FCA 48, at para 8. The Federal Court of Appeal in *Perez* and in *Association of Universities* described three exceptions to the general rule: (i) an affidavit that provides general background in circumstances where that information might assist the court in understanding the issues relevant to the judicial review; (ii) an affidavit that is necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision maker, to enable the court to fulfil its role of reviewing the decision for procedural unfairness; and (iii) an affidavit that highlights the complete absence of evidence before the decision-maker when it made a particular finding. There may be additional exceptions, as the list is not closed. See the discussions in *Perez*, at paragraph 16, and in *Association of Universities*, at paragraph 20.

[42] I will address each affidavit in turn.

[43] In my view, substantially all of the applicant's first affidavit, filed with her application record, is admissible on this application. Its contents concern general background and go directly to her allegations of procedural unfairness and the events that occurred at the port of entry that do not otherwise appear in the record. Without this evidence, she could not advance her position on alleged procedural unfairness, bias and right to counsel.

[44] The contents of the applicant's second affidavit are partly admissible on this application. The second affidavit refers to her offer to undergo a DNA test while at the port of entry, which relates to her claim of procedural unfairness. However, the results of later DNA tests are not admissible on this application because they go to the merits of her claim to be eligible to claim

refugee protection in Canada under the *IRPA* and *IRPR*. In other words, the DNA tests and her comments on them attempt to supplement the evidence that was presented by the applicant at the port of entry with additional evidence to prove the existence of a family member in Canada.

[45] The affidavit filed by the applicant that attaches the DNA test results is not admissible. The DNA tests occurred in February/March 2021, well after the decision at issue in this judicial review application. The evidence goes to the merits of whether the applicant qualifies for the exemption she claimed at the port of entry, on the basis that she is the half-sibling of a person in Canada.

[46] Nearly all of Vera's affidavit is admissible because it speaks to events related to the applicant's position on procedural unfairness. This affidavit also addresses what Vera told the MD on June 15, 2020, about how the applicant and Vera first came into contact. Paragraph 11 of the affidavit is admissible as it is part of the chronology of what happened on that day. The affidavit does not purport to add any new explanation of how they came into contact other than what was stated to the MD.

[47] The affidavit from the applicant's mother is partially admissible. Paragraphs 7-8 concern the mother's interactions with CBSA while the applicant was at the port of entry and are therefore related to her claim of procedural unfairness on this application. However, the evidence in the mother's affidavit concerning the identity of the applicant and the circumstances and explanation for how the mother obtained the applicant's (non-genuine) birth certificate are not admissible as they go to the merits of the applicant's original claim at the port of entry. The

mother's affidavit also refers to how Vera first came into contact with the applicant. This new evidence is inadmissible because the mother declined to provide information to CBSA while the applicant was at the port of entry. New evidence on that topic cannot be adduced now.

[48] On the respondent's side, the MD's affidavit filed to answer (in part) the applicant's three initial affidavits is admissible, as it goes to the same procedural fairness issue. This affidavit explains the existence and process for making a complaint, which goes to procedural fairness issues. The affidavit advises that the applicant did not raise a right to counsel on June 15, 2020, which is admissible. The affidavit advises that the MD did not receive the attestation of birth before making exclusion order, which is admissible as to the process followed by the MD only. There are certain minor comments in the MD's affidavit that appear to confirm or back up the reasons provided in June 2020 for the decision to make an Exclusion Order. Those comments are not admissible.

[49] The very brief affidavit by the CBSA supervisor of the officer, who is responsible for management of human resources at the port of entry, is admissible to address the absence of a responding affidavit from the officer.

III. Analysis

[50] I turn to the substantive issues and submissions raised by the applicant.

A. ***Reasonableness of the Exclusion Order***

[51] On this application for judicial review, the standard of review of the MD's substantive decision is reasonableness, as described in *Vavilov*. Reasonableness review is a deferential and disciplined evaluation of whether an administrative decision is transparent, intelligible and justified: *Vavilov*, at paras 12-13 and 15. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrained the decision maker: *Vavilov*, esp. at paras 85, 99, 101, 105-106 and 194.

[52] Although the application for leave and judicial review formally challenged the Exclusion Order, both of the parties' submissions addressed the issues underlying both the officer's and the MD's decisions. The applicant focused her submissions on the merits of her request to enter Canada, while the respondent submitted that the MD's analysis was reasonable having regard to the evidence. Specifically, the respondent submitted that it was reasonable to issue the Exclusion Order because the applicant's birth certificate was fraudulent (something effectively acknowledged by the applicant on the basis that she did not know it at the time) and because the officer reasonably drew a negative inference from the differences between the applicant's and Vera's respective stories about how they first made contact.

[53] I agree with the respondent. The applicant has not identified any error of law made by either the officer or the MD. In addition, I am not persuaded that the MD fundamentally misapprehended or failed to take into account any evidence in the record: *Vavilov*, at paras 125-126. The applicant pointed to the MD's failure to take into account the Attestation of Birth in

relation to the applicant. After a conversation with the officer late in the evening of June 14, 2020, Vera obtained the document from the Nigerian government on June 15, 2020. According to her affidavit, she faxed it to the CBSA that afternoon. However, it apparently did not reach the MD before she completed her report under subsection 44(2) and prepared the exclusion order. The Certified Tribunal Record contained the applicant's Attestation of Birth but the MD did not mention it in her Review and Determination report.

[54] Having considered the contents of the birth attestation document, the two reasons for the MD's conclusion and their basis in the MD's report, and the onus on the applicant to provide supporting documentation when she arrived at the port of entry, I find no reversible error in the MD's analysis of the circumstances and decision to issue an Exclusion Order. The applicant effectively conceded on this application that the birth certificate she proffered was not genuine; she noted that she received it from her mother and her mother was duped. In addition, the applicant did not seriously challenge the finding that her and Vera's stories about how they first made contact were inconsistent.

[55] For these reasons, I conclude that the applicant has not demonstrated that the Exclusion Order should be set aside as unreasonable, applying the principles in *Vavilov.*

B. ***Procedural Fairness***

[56] The Court's review of procedural fairness issues involves no deference to the decision maker. The question is whether the procedure was fair having regard to all of the circumstances: *Gordillo v Canada (Attorney General)*, 2022 FCA 23, at para 63; *Canadian Pacific Railway*

Company v Canada (Transportation Agency), 2021 FCA 69, at paras 46-47; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, [2019] 1 FCR 121, esp. at paras 49 and 54; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

[57] The applicant submitted that the officer made a series of flawed findings and rendered a decision that fundamentally flowed from bias against the applicant. She relied principally on her own affidavits as well as Vera's affidavit, in relation to the events that occurred at the port of entry.

[58] The applicant submitted to this Court that the conditions created by the various officers she encountered at the port of entry "frustrated the refugee claims and doomed them to an inevitable rejection". The applicant's first affidavit, filed in the Application Record, describes how she was immediately met with hostility when she arrived at the border and asked for entry documents to seek refugee protection. Her affidavit describes incidents involving several different officers, male and female, not just the officer who wrote the subsection 44(1) report. The affidavit related incidents in which an officer spoke to her "in anger" and in a "demeaning manner". She stated that she was interviewed with "so much hostility". She related that her son was autistic and CBSA officers responded to certain behaviours with intolerance or a lack of understanding. She related the sequence of events leading to her family having to sleep on the floor in the room where she was being interviewed at the port of entry because CBSA did not permit her and her children to enter Canada and return to the port of entry the next morning.

[59] The applicant raised no specific concerns about the conduct of the MD, other than that she (a) would not entertain the applicant's offer to take a DNA test, and (b) she insisted that the applicant sign papers withdrawing her request to enter Canada after the Exclusion Order was issued.

[60] The respondent did not file an affidavit from the officer to respond to the applicant's affidavit, as the officer was on leave. The MD filed an affidavit indicating that she had no recollection of seeing any interactions between the officer and the applicant or her children, and had no recollection of the applicant complaining to her about mistreatment.

[61] The applicant observed that the respondent had filed no evidence to contradict her affidavit. The respondent did not cross-examine the applicant on her affidavit. The respondent submitted that the applicant raised no issue at the time of the events in June 2020 and had not subsequently filed a complaint to the CBSA at any time in relation to alleged mistreatment.

[62] The applicant's position was essentially that she did not get a fair opportunity to make a refugee claim. She submitted that there was evidence beyond her fraudulent birth certificate that should or could have been taken into account, including if the officers had interviewed Vera and Harriet at CBSA's offices, and had accepted the applicant and her sister's offers to undergo a DNA test, admitted photographs and accessed the applicant's immigration records in the possession of the United States.

[63] The test for reasonable apprehension of bias is whether a reasonable and informed person, with knowledge of all the relevant circumstances, viewing the matter realistically and practically, would think that it is more likely than not that the decision maker, whether consciously or not, would not decide the matter fairly: *Gulia v Canada (Attorney General)*, 2021 FCA 106, at para 17; *Younis v Canada (Immigration, Refugees and Citizenship)*, 2021 FCA 49, at paras 35-37; *Committee for Justice and Liberty et al. v National Energy Board et al.*, [1978] 1 SCR 369, at p. 394.

[64] The onus of demonstrating bias rests with the party that alleges it: *R v S (RD)*, [1997] 3 SCR 484, at para 114; *Younis*, at para 37, citing *ABB Inc v. Hyundai Heavy Industries Co*, 2015 FCA 157, at para 55.

[65] In a recent decision, Justice Aylen stated that an allegation of reasonable apprehension of bias must be supported by material evidence demonstrating conduct that derogates from the standard. It cannot rest on mere suspicion, insinuations or mere impressions of a party or their counsel: *Li v Canada (Citizenship and Immigration)*, 2022 FC 542, at para 15 (referring to *Arthur v Canada (Attorney General)*, 2001 FCA 223 at para 8; *Ramirez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 809 at para 11; *Maxim v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1029 at para 30).

[66] Considering the applicant's affidavit evidence about the events on June 14-15, 2020 and the contents of the CBSA documents prepared on those days, I do not believe that the events give rise to a reasonable apprehension of bias. First, I am not persuaded that the events show a

reasonable apprehension of bias on the part of the officer or the MD. There were no specific allegations of bias against the MD, whose decision is under review in this application. More broadly, the evidence suggests that the CBSA personnel were skeptical of the applicant's claim for an exemption from the Safe Third Country Agreement after the applicant presented a Nigerian birth certificate that both the officer and the MD quickly and reasonably found to be non-genuine based on open source inquiries (that were not challenged in this Court). Equally, CBSA was entitled to inquire into and test other aspects of the applicant's claim for an exemption based on having a half-sibling in Canada.

[67] Second, the applicant's submissions on this application to support her position on unfairness do not demonstrate bias, or a reasonable apprehension of bias. Instead, they argue about the merits of the decision made under paragraph 101(1)(*e*) of the *IRPA* and specifically about whether she should have been found to have an exemption from the Safe Third Country Agreement owing to her alleged family members in Canada under section 159.5 of the *IRPR*. That is not an argument about bias. It is a disagreement about the proper outcome of her request to enter Canada.

[68] Third, the respondent submitted that the events giving rise to the alleged misconduct occurred a long time ago and had not been proven on a balance of probabilities. The respondent noted that no complaint has been filed and that the MD's affidavit advised that she had no recollection of seeing or being told about any such misconduct. In any event, the respondent submitted that even if true, the conduct had no impact on the decision or the ultimate outcome

owing to the admittedly non-genuine birth certificate and the conflicting evidence about how the applicant and her sister first made contact.

[69] I am not persuaded that the passage of time or the mere absence of a complaint to CBSA in mid-June 2020 (or since), is a sufficient basis not to believe the contents of the applicant's affidavit. The applicant's affidavit is not cursory; it contains information about specific incidents and is detailed, giving it a ring of truth. In other words, although the applicant tendered a non-genuine document at the border, her affidavit contained common hallmarks of a statement that accurately describes her recollection of events.

[70] It is unfortunate that the officer's recollections of that day, if any, were not memorialized after the applicant's affidavit was filed in the Application Record in February 2021. While the respondent's evidence indicated that the officer was on "authorized leave" until September 2022, the evidence did not advise when that leave commenced. Nor did it state that the officer was not available at all to provide evidence (recognizing the difference between being on authorized leave from employment on one hand, and being entirely unavailable to provide evidence to respond to the applicant's evidence, on the other hand).

[71] However, considering whether the events in the applicant's sworn testimony raise a reasonable apprehension of bias, I conclude that they do not. The evidence does not show that the MD approached the decision to make an Exclusion Order in a manner that was unfair. The applicant made no specific allegations of unfairness or mistreatment by the MD prior to her decision (except as concerns the offer to take a DNA test, which is addressed below). The MD's

notes are logical, clear, and focused on the applicant's position and the evidence. They make no reference to extraneous or irrelevant considerations. The applicant did not point to any evidence that the MD's decision was improperly affected or influenced by any other CBSA officer or their (mis)treatment of the applicant and her children. Accordingly, the applicant's position on a reasonable apprehension of bias cannot be sustained on the evidence and arguments made on this application.

[72] I am also aware of the applicant's submission on this application that her race was a factor in the way she was treated. The evidence in the applicant's affidavits on this application did not connect her treatment by CBSA with her race, ethnicity, or heritage. As the point is not dispositive of this application, I make no finding on it.

[73] Having said that, I do appreciate the applicant's evidence about how she felt she was treated, and how her son's behaviour was met with apparent intolerance. The conclusions in these Reasons do not condone any conduct that made the applicant or her son feel demeaned or otherwise mistreated.

[74] I have also considered whether the applicant's evidence shows that she did not have a fair opportunity to respond to the CBSA's two principal concerns, which were (a) the authenticity of her birth certificate and (b) whether she and Vera were half-sisters. In my view, the applicant was advised of these concerns in a timely manner and CBSA afforded her sufficient opportunity to respond (including by contacting Vera and attempting to contact the applicant's mother).

[75] Although the applicant argued that the CBSA should have taken up her offer of a DNA test to prove her half-sister relationship with Vera, the applicant did not point to any legal obligation on CBSA to do so. If the applicant wanted to rely on DNA evidence to gain entry to Canada, she and Vera could and should have obtained the test results before the applicant arrived at the port of entry.

[76] I also do not agree with the applicant's submission that a mere review of the attestation of birth document obtained on June 15, 2020, would necessarily have resolved the CBSA's concerns. On a judicial review application, it is not the Court's role to decide for itself what it would do, or the CBSA would have done, with facts or documents that were not before the MD when the Exclusion Order was made: *Vavilov*, at paras 75, 83 and 96-97.

[77] Lastly, the applicant argued that she was entitled to consult legal counsel in the unusual circumstances of this case and was denied the opportunity to do so. The applicant "conceded that there [was] no right to legal representation during secondary examinations at the port of entry and that the process does not amount to arrest that would in turn trigger a right to counsel" (referring to *Dehghani v Canada (Minister of Employment and Immigration)*, [1993] 1 SCR 1053). However, the applicant argued that the circumstances here were distinguishable because she had "entitlements" to a refugee eligibility determination owing to her Canada-based relative under the Safe Third Country Agreement.

[78] Relying on *Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126, [2007] 1 FCR 409, the respondent's position was that the applicant had no right to be informed

of her right to counsel in the context of procedures under *IRPA* subsections 44(1) and (2), nor was there any right to counsel in respect of the MD's decision under subsection 44(2). In addition to *Cha*, at paragraph 60, the respondent also referred to *Liu v Canada (Citizenship and Immigration)*, 2017 FC 562, at para 55, and *Maganga v Canada (Citizenship and Immigration)*, 2007 FC 94, at para 39. The respondent maintained that in this case, the applicant did not request counsel nor was she denied counsel. In addition, family members retained Canadian legal counsel on June 15, 2020, albeit after the MD's decision was made.

[79] The applicant did not point to any applicable right to counsel in the *IRPA* or *IRPR*. A right to counsel is found in section 10(b) of the *Canadian Charter of Rights and Freedoms*. In *Dehghani*, the Supreme Court stated that "in an immigration examination for routine information-gathering purposes, the right to counsel does not extend beyond those circumstances of arrest or detention described in s. 10(b)" of the *Charter*: at p. 1077. In *Canada (Citizenship and Immigration) v Paramo de Gutierrez*, 2016 FCA 211, [2017] 2 FCR 353, at paragraph 54, the Federal Court of Appeal observed that a refugee claimant "does not have a right to counsel at an interview relating to their eligibility to claim refugee status", citing *Dehghani*.

[80] In my view, the applicant has not established that she was deprived of a right to counsel in the present circumstances. In this administrative context, and on the submissions made and the case authorities cited below, the applicant either (a) did not have a right to counsel while she was in secondary examination (see *Cha*, at paras 54-61), or (b) she was not detained through a deprivation of liberty for the purposes of section 10(b) of the *Charter*: see *Chevez v Canada (Minister of Citizenship and Immigration)*, 2007 FC 709, [2008] 1 FCR 354, at paras 11-12 and

the cases cited there; *Diakité v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1268, at para 16; *Yakoubi v Canada (Public Safety and Emergency Preparedness)* 2019 FC 776, at paras 18-20.

[81] I therefore conclude that the applicant has not established that she was denied procedural fairness.

IV. Conclusion

[82] The application is therefore dismissed.

[83] Neither party proposed a question to be certified for appeal, although during the hearing the applicant requested an opportunity to consider the matter further. No further submissions have been received since the hearing on this topic. I conclude that no question should be certified for appeal. This application turned on its unique facts and the application of settled law to them.

JUDGMENT in IMM-2877-20

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.
2. No question is certified under paragraph 74(*d*) of the *Immigration and Refugee Protection Act.*

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2877-20
STYLE OF CAUSE:	NGOZI JESSICA OBODO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 23, 2022
REASONS FOR JUDGMENT AND JUDGMENT:	A.D. LITTLE J.
DATED:	NOVEMBER 1, 2022

APPEARANCES:

Kingsley I. Jesuorobo	FOR THE APPLICANT
Daniel Engel	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Kingsley I. Jesuorobo Barrister & Solicitor North York, Ontario	FOR THE APPLICANT
Daniel Engel Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT