

Federal Court



Cour fédérale

**Date: 20221219**

**Docket: IMM-8254-21**

**Citation: 2022 FC 1760**

**Ottawa, Ontario, December 19, 2022**

**PRESENT: The Honourable Justice Fuhrer**

**BETWEEN:**

**ELIJAH NYAKEBE AYAYE**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] The Applicant, Elijah Ayaye, is a citizen of Kenya. He fears the Chinkororo militia which the Applicant asserts demanded protection money from him and made threats against him and his family. The Applicant therefore fled to Canada and claimed refugee protection.

[2] The Refugee Protection Division [RPD] of the Immigration and Refugee Board dismissed his claim, the determinative issue being credibility. The Refugee Appeal Division [RAD] dismissed the appeal [Decision], finding the RPD was correct in determining that the Applicant is neither a Convention refugee nor a person in need of protection.

[3] The Applicant seeks judicial review of the Decision, asserting that the RAD's treatment of the following evidence was unreasonable: (i) the Applicant's port of entry [POE] statements; (ii) the Applicant's supporting affidavit evidence; and (iii) omissions in the Applicant's basis of claim [BOC] narrative.

[4] The overarching issue for determination in this matter is whether the Decision was reasonable. There is no dispute that the presumptive reasonableness standard of review applies to the Court's review of the Decision: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 17, 25. I find that none of the situations rebutting the presumptive standard is present here.

[5] To avoid judicial intervention, the decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility: *Vavilov*, at para 99. A decision may be unreasonable if the decision maker misapprehended the evidence before it or did not meaningfully account for or grapple with central or key issues and arguments raised by the parties: *Vavilov*, at paras 126-127. The party challenging the decision has the onus of demonstrating that the decision is unreasonable: *Vavilov*, at para 100.

[6] For the reasons below, I find that the Applicant here has not met his onus. I thus dismiss this judicial review application.

## II. Analysis

### A. *POE Statements*

[7] Contrary to the Applicant's submissions, I am not persuaded that the RAD's reasons demonstrate an unacceptable over-reliance on the Applicant's POE statements. As explained below, I find the Applicant's reliance on *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 (CanLII) [*Lubana*], is misplaced.

[8] During his first interview at the POE, the Applicant stated that he feared those who provided him with falsified documents to come to Canada. When asked to clarify, the Applicant identified these people by name and described why he asked them to obtain a visa for him (they brought people to Canada for work because there are no jobs in Kenya). He also stated that his family did not accompany him because the children were in school studying. Further, he came to Canada using his wife's money and would not be welcome if he went back.

[9] At his second interview more than two months later, however, the Applicant stated that he came to Canada because the Chinkororo were looking for him in Kenya for not paying protection money and that his family was in hiding. His basis of claim [BOC] form provides more details regarding the Applicant's fear of the Chinkororo.

[10] I find that in the circumstances, it was not unreasonable for the RAD to conclude, having reviewed the Applicant's POE statements, his BOC, and a psychological assessment, that the RPD was correct in drawing a negative inference regarding the inconsistencies. In my view, the RAD did not perform a microscopic examination of issues irrelevant or peripheral to the Applicant's claim: *Lubana*, above at para 11. Instead, the RAD focussed on the central issue of the Applicant's reasons for coming to Canada: *Gaprindashvili v Canada (Citizenship and Immigration)*, 2019 FC 583 at para 24.

[11] Further, this is not a case where the Applicant destroyed travel documents or told lies about them upon arrival following an agent's instructions: *Lubana*, above at para 11. Rather, the Applicant here admitted travelling with false documents.

[12] I also am not convinced that the Decision represents a lack of sensitivity on the part of the RAD, as argued by the Applicant, in assessing the Applicant's POE statements: *Gabila v Canada (Citizenship and Immigration)*, 2016 FC 574 [*Gabila*] at para 34. That the RAD considered the statements in the two interviews inconsistent in the face of a significant change in the Applicant's explanations for coming to Canada, in itself, does not demonstrate a lack of sensitivity, in my view.

[13] I find that the RAD, after acknowledging the psychological assessment and accepting that the Applicant may have experienced depression and anxiety at the time he entered Canada, explained in clear and unmistakable terms the care the POE officer took in ensuring the

Applicant understood the interpreter provided to him and in understanding the questions asked of him, including asking follow up questions if the Applicant initially did not answer directly.

[14] In the circumstances, it was not unreasonable in my view for the RAD to conclude the inconsistencies in his statements did not result from his psychological condition, on a balance of probabilities. Unlike in *Gabila*, the Applicant here did not provide a detailed explanation for inconsistencies between his POE statements, BOC, and testimony, but rather stated that he did not understand himself. Further, although the Applicant did mention to the RPD that he was having medical issues during the hearing, he told the RPD that he felt well enough to testify. This was not a situation, like in *Lubana*, where the applicant broke down during testimony.

[15] I find the Decision readily permits the Court to understand the RAD's reasons for drawing negative inferences regarding the Applicant's credibility which in my view are rationally supported: *Kaur v Canada (Citizenship and Immigration)*, 2012 FC 1379 at para 34.

#### B. *Supporting Affidavit Evidence*

[16] I am not convinced that the RAD's treatment of the Applicant's supporting affidavit evidence, including affidavits from his spouse, neighbours/family friends, and a clan elder from the same clan as the Applicant, on the whole was unreasonable.

[17] In concluding the affidavits did not comply with the requirements for preparing and commissioning affidavits in Kenya, the RAD points to an article from a lawyer that explains affidavits usually are prepared by lawyers and "must" be commissioned by someone different

than the lawyer who drew up the affidavit. The RAD also considers a second article that discusses the duties of a commissioner for oaths, which include preparing an affidavit. The RAD finds the articles are not inconsistent because there is “no indication that the commissioner for oaths is the same individual, who can act in this role, which can be a second commissioner for oaths.” The RAD also indicates that there is no content in the second article suggesting that there are exceptions regarding the mandatory language in the first article that the person who prepares the affidavit and the commissioner must be different.

[18] In my view, the RAD’s concerns with the second article regarding the duties of the commissioner and the lack of exceptions are a misstep because the RAD focusses on what the article does not say, rather than what it does. Further, the Respondent conceded at the judicial review hearing that the RAD’s assessment of whether the supporting affidavit evidence was commissioned properly, in itself, would be insufficient to discount the evidence.

[19] I note, however, that not every flaw or shortcoming in a decision will render it unreasonable on the whole: *Metallo v Canada (Citizenship and Immigration)*, 2021 FC 575 at para 26, citing *Vavilov*, above at para 100. I agree with the Respondent that notwithstanding the RAD’s misstep regarding whether the affidavits were commissioned properly, the RAD nonetheless considered the contents of the affidavits and found other reasons for discounting the evidence including inconsistencies, a fraudulent identity card, and a missing date on which one of the affidavits was sworn.

[20] In my view, the circumstances here are distinguishable from the guidance of this Court in *Paxi v Canada (Citizenship and Immigration)*, 2016 FC 905 [*Paxi*], on which the Applicant sought to rely. In *Paxi*, the tribunal had discounted a support letter because it was not notarized: *Paxi*, above at para 51. Justice Russell noted the letter had other markers of authenticity, as it was written on church letterhead, and was dated and signed: *Paxi*, above at para 52. In the case before me, the RAD did not discount the affidavit evidence simply for not being sworn or notarized. The evidence was considered and given no weight for other reasons concerning their authenticity: *Mathieu v Canada (Citizenship and Immigration)*, 2021 FC 249 at para 29.

[21] I thus find the RAD's reasons for assigning no weight to the affidavits were not unreasonable on the whole.

### C. *BOC Omissions*

[22] I am satisfied that the RAD's treatment of two omissions from the Applicant's BOC was not unreasonable.

[23] The Applicant's BOC, contrary to his testimony, did not mention that his spouse was approached by the Chinkororo between April and September 2019, nor that his friend advised him the Chinkororo was still looking for her during that time. The RAD found that these were not peripheral details and that the BOC narrative, which the Applicant prepared with the assistance of counsel and swore as to its truth and completeness, is a sworn statement of facts describing why the Applicant needs refugee protection in Canada. The RAD was not satisfied with the Applicant's explanation that his continued shock and confusion prevented him from

remembering these events because the Applicant had ample time to review and amend or revise his BOC prior to the hearing.

[24] I find the RAD's rationale and conclusion that the Applicant attempted to embellish his claim were justified in the circumstances. I disagree with the Applicant that it is an error to impugn credibility because of BOC omissions, having regard to the *Maldonado* presumption of truthfulness, especially when there are other credibility concerns at play: *Maldonado v Minister of Employment and Immigration*, 1979 CanLII 4098 (FCA).

### III. Conclusion

[25] For the above reasons, I conclude that the Decision is justified in relation to the applicable factual context and legal constraints on the RAD: *Vavilov*, above at para 90. I therefore dismiss the Applicant's judicial review application.

[26] Neither party proposed a serious question of general importance for certification and I find that none arises in the circumstances.



**JUDGMENT in IMM-8254-21**

**THIS COURT'S JUDGMENT is that:**

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

"Janet M. Fuhrer"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-8254-21

**STYLE OF CAUSE:** ELIJAH NYAKEBE AYAYE v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** HELD VIA VIDEOCONFERENCE

**DATE OF HEARING:** DECEMBER 14, 2022

**JUDGMENT AND REASONS:** FUHRER J.

**DATED:** DECEMBER 19, 2022

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