Federal Court  Cour fédérale

Date: 20210104

Docket: IMM-7861-19

Citation: 2021 FC 2

Ottawa, Ontario, January 4, 2021

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

JUSTINA OLUWAKEMI OWOLABI,
MOSHOOD RICHARD OWOLABI - MINOR,
ABDUL MALIK RAY OWOLABI - MINOR

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board, which upheld the decision of the Refugee Protection Division [RPD]. The RPD determined the Applicants are not Convention refugees or

persons in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [*IRPA*].

II. Facts

[2] The Applicants, a mother [Principal Applicant] and her two minor children, are citizens of Nigeria. They are Christians from the Yoruba ethnic group. The Principal Applicant's ex-husband and father of her children is Muslim. The Principal Applicant worked as a "primary II teacher" with the Nigeria Police Force for approximately five years.

[3] According to her Basis of Claim [BOC] their third child died at the age of 19 months from tetanus after the Principal Applicant gave consent for her ex-husband's family to give him the tribal markings they wanted him to receive. After the child became infected from tetanus, the Principal Applicant was not allowed to take her son to the hospital. She only managed to take him there when he started to have convulsions and refused to eat. The Principal Applicant did not complain to the police after his death because she assumed the police would classify the matter as a domestic conflict and a traditional matter and close the case.

[4] The mother added significantly to this narrative in testimony before the RPD, with horrific details of these events, as discussed later.

[5] In her BOC, the Principal Applicant said "[w]e love each other and we believe that religion cannot separate our love"…"[m]y husband has never stop (*sic*) making me happy but I feel the impact of the lost child, which is a family issue. My in-laws have never stop (*sic*) calling

my husband to bring us back to Nigeria so they can give the customary tribal marks to the other two children."

[6] However, the Principal Applicant filed an addendum to her BOC, the date of which is not provided in the record [Addendum]. In the Addendum, she states her husband changed. He no longer wanted a relationship with his surviving children and he insulted and physically abused her.

[7] The Applicants left Nigeria on April 23, 2017 and entered the United States of America. In her BOC, the Principal Applicant says that her husband decided to take them to the USA for a holiday. In the Addendum, she conversely said her husband did not want to travel to the USA so she applied for a visa for her sons and herself separately. Then her husband changed his mind and also applied, so they received their visas at different times.

[8] The Principal Applicant stated in her BOC her husband travelled with her and the children to the USA, and they have not seen him since November 3, 2017.

[9] This is also in dispute.

[10] The Principal Applicant is afraid her other two male children will suffer the same fate as her deceased son if they return to Nigeria. The Principal Applicant says her ex-husband's family has constantly pressured the couple to entrust their two sons to them and have them receive tribal markings. The Principal Applicant says that she fears for their lives.

[11] The Applicants submitted their BOCs on February 27, 2018. The RPD rejected their claim for refugee protection on July 12, 2019.

[12] The RPD determined the Applicants were neither Convention refugees nor persons in need of protection pursuant to sections 96 and 97 of *IPRA*. The RPD reviewed all of the evidence the Applicants provided and also reviewed and applied *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution*.

[13] The RPD found the Principal Applicant was not credible because of significant discrepancies between her BOC and her oral testimony, specifically in relation to the death of her son, alleged violence at the hands of her former in-laws, alleged physical abuse by her ex-husband, and whether or not her husband went to the USA with her and when he left.

[14] The RPD said the following in conclusion:

> [32] For these reasons, the RPD finds that the female claimant is not credible regarding the fundamental elements of her account. The female claimant may have lost a child and has been very affected by it. The panel is sensitive to that issue.
>
> [33] However, the RPD does not believe that this death happened in the way the female claimant described. The female claimant is not credible on this point.
>
> [34] Nor does the panel believe that the claimant traveled with her ex-husband to the United States and that she was the victim of physical abuse related to domestic violence.
>
> [35] The female claimant may have psychiatric problems, as described by the nurse clinician, Marie-Eve Isabel, but this panel does not believe that it is related to the female claimant's allegations, as she has not established her credibility.

> [36] She failed to demonstrate the allegations in support of her fear and that of her two sons, the male claimants.
>
> [37] In light of these elements, the RPD is of the opinion that the claimants have not established that they would have a well-founded fear of persecution under section 96 or within the meaning of subsection 97(1) of the *IRPA* if they were to return to their country of origin.

[15] The RPD rejected the claim on the grounds that the claim was not well-founded because of serious credibility issues.

III. Decision under review

[16] The Applicant filed an appeal with the RAD which dismissed the appeal on December 16, 2019, confirming the decision of the RPD [Decision].

[17] The Applicants submitted several documents as "new evidence" to the RAD which are discussed later in these Reasons.

[18] The RAD considered each document against the tests set out in section 110(4) of *IRPA* and *Canada (Citizenship and Immigration) v. Singh*, 2016 FCA 96 [*Singh*] [de Montigny JA].

[19] An appellant challenging a decision of the RPD is permitted to submit new evidence to the RAD so long as it complies with subsection 110(4) of *IRPA*:

Appeal	**Appel**
110 (1) Subject to subsections (1.1) and (2), a person or the Minister may appeal, in	**110 (1)** Sous réserve des paragraphes (1.1) et (2), la personne en cause et le

accordance with the rules of the Board, on a question of law, of fact or of mixed law and fact, to the Refugee Appeal Division against a decision of the Refugee Protection Division to allow or reject the person's claim for refugee protection.	ministre peuvent, conformément aux règles de la Commission, porter en appel — relativement à une question de droit, de fait ou mixte — auprès de la Section d'appel des réfugiés la décision de la Section de la protection des réfugiés accordant ou rejetant la demande d'asile.
…	…
Evidence that may be presented	**Éléments de preuve admissibles**
(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.	**(4)** Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

[20] The RAD decided not to accept any of the documents presented as new evidence. The RAD agreed with the RPD and found the Applicants had not established they were Convention refugees or persons in need of protection pursuant to sections 96 and 97 of *IRPA*.

IV. Issue

[21] The issue in this application is whether the Decision in respect of the new evidence and on the merits is reasonable.

V. Standard of Review

[22] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*] Justice Rowe said that *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] set out a revised framework for determining the applicable standard of review for administrative decisions. The starting point is a presumption that a standard of reasonableness applies. This presumption can be rebutted in certain situations, none of which apply in this case. Therefore, the Decision is reviewable on a standard of reasonableness.

[23] In *Canada Post*, Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). 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, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).

> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).

[24] The Supreme Court of Canada in *Vavilov*, at para 86 states "it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision maker to those to whom the decision applies." The reviewing court must be satisfied the decision maker's reasoning "adds up":

> [104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".
>
> [105] In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: *Dunsmuir*, at para. 47; *Catalyst*, at para. 13; *Nor-Man Regional Health Authority*, at para. 6. Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers.

[25] Furthermore, *Vavilov* makes it clear that the role of this Court is not to reweigh and reassess the evidence:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of

> the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
>
> [Emphasis added]

[26] See also *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 [*CHRC*] [Gascon J]:

> [55] In reasonableness review, the reviewing court is concerned mostly with "the existence of justification, transparency and intelligibility within the decision-making process" and with determining "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 14). When applied to a statutory interpretation exercise, reasonableness review recognizes that the delegated decision maker is better situated to understand the policy concerns and context needed to resolve any ambiguities in the statute (*McLean*, at para. 33). Reviewing courts must also refrain from reweighing and reassessing the evidence considered by the decision maker (*Khosa*, at para. 64). At its core, reasonableness review recognizes the legitimacy of multiple possible outcomes, even where they are not the court's preferred solution.
>
> [Emphasis added]

[27] See also *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*] [Binnie J]:

> [64] In this case, both the majority and dissenting reasons of the IAD disclose with clarity the considerations in support of both points of view, and the reasons for the disagreement as to outcome. At the factual level, the IAD divided in large part over differing

interpretations of Khosa's expression of remorse, as was pointed out by Lutfy C.J. According to the IAD majority:

> It is troublesome to the panel that [*Khosa*] continues to deny that his participation in a "street-race" led to the disastrous consequences. . . . At the same time, I am mindful of [*Khosa's*] show of relative remorse at this hearing for his excessive speed in a public roadway and note the trial judge's finding of this remorse . . . . This show of remorse is a positive factor going to the exercise of special relief. However, I do not see it as a compelling feature of the case in light of the limited nature of [*Khosa's*] admissions at this hearing. [Emphasis added; para. 15.]

According to the IAD dissent on the other hand:

> . . . from early on he [*Khosa*] has accepted responsibility for his actions. He was prepared to plead guilty to dangerous driving causing death . . . .
>
> I find that [*Khosa*] is contrite and remorseful. [*Khosa*] at hearing was regretful, his voice tremulous and filled with emotion. . . .
>
> . . .
>
> The majority of this panel have placed great significance on [*Khosa's*] dispute that he was racing, when the criminal court found he was. And while they concluded this was "not fatal" to his appeal, they also determined that his continued denial that he was racing "reflects a lack of insight." The panel concluded that this "is not to his credit." The panel found that [*Khosa*] was remorseful, but concluded it was not a "compelling feature in light of the limited nature of [*Khosa's*] admissions".
>
> However I find [*Khosa's*] remorse, even in light of his denial he was racing, is genuine and is evidence that [*Khosa*] will in future be more thoughtful and will avoid such recklessness. [paras. 50-51 and 53-54]

> It seems evident that this is the sort of factual dispute which should be resolved by the IAD in the application of immigration policy, and not reweighed in the courts.
>
> [Emphasis added]

VI. Analysis

A. *Admissibility of New Evidence*

[28] The Principal Applicant's claim centres on two allegations of risk that she made before both the RPD and the RAD: risk to herself from her abusive ex-husband, and risk to her two remaining children from scarification at the hands of her in-laws in Nigeria.

[29] In relation to the allegation of risk by an abusive ex-husband, the RPD found the mother not credible. This was because in her BOC she claimed she had a loving relationship with him, but in the Addendum and in oral testimony she alleged a relationship in which she suffered abuse and violence from him. She also alleged in her BOC that the abuse took place in the USA, where she was with him from their arrival in April until his departure in November, 2017. However at the RPD she filed a divorce document which stated that her husband was in Nigeria in May 9, 2017 where he appeared at the relevant court in Nigeria.

[30] To rebut the RPD's negative credibility findings and disbelief of the spousal abuse allegation, the Principal Applicant submitted several documents to the RAD asking they be admitted as "new evidence": a photograph of the passport and USA visa of the Principal Applicant's husband, undated photographs of the family allegedly taken in the USA and on a large airplane, a letter from the African Family Health Organization in the USA regarding

domestic violence, two psychological reports, and an oath made between the Principal Applicant and her husband to be faithful. These were submitted to prove the Principal Applicant's husband was indeed physically in the USA and with the Applicants; however the RAD rejected this evidence.

[31] The Principal Applicant acknowledged that the proposed new evidence pre-dated the RPD decision. However, the Principal Applicant explained to the RAD that due to her mental state, she did not realize she could present the evidence prior to the RPD decision. I note she was represented by counsel before the RPD, and when she prepared and signed her BOC.

[32] In terms of her mental state, the Principal Applicant was seen by a nurse practitioner who reported she had the difficulties in adapting with sadness and anxiety and showed signs of trauma. The Principal Applicant says that she has symptoms consistent with Post-Traumatic Stress Disorder including forgetfulness and difficulty in concentrating. She says this prevented her from fully understanding the need to prove her husband was with her in the USA at the relevant time. In this connection, and while not dealing with new evidence, the RAD undertook an analysis of the nurse practitioner's report before the RPD in relation to her mental health.

[33] The RAD found, reasonably in my view, that the Principal Applicant's mental health did not cause her "inability to provide credible evidence". This finding was open to the RAD on the record, and with respect, the Applicants' request invites the Court to reassess and reweigh the evidence. I will discuss this matter further below.

[34] The RAD acknowledged the photograph of the passport and USA visa of the Principal Applicant's husband and entry stamp date assisted in documenting the domestic violence and whereabouts of her ex-husband at the relevant time. However, the RAD rejected it for a number of reasons including that it was reasonably available at the time of the RPD hearing. With respect, this finding was open on the record, and in any event the Applicants ask me to reweigh and reassess the evidence in this respect which binding jurisprudence prevents me from doing: see *Vavilov* at para 125, *CHRC* at para 55 and *Khosa* at para 64.

[35] The RAD also rejected undated photographs of the family allegedly taken in the USA and on an airplane. Again, I am not persuaded the RAD unreasonably rejected these because they also could have been presented earlier. Again, I am asked to reweigh and reassess the evidence before the RAD which, with respect, is not the role of this Court.

[36] The RAD also rejected a letter from the African Family Health Organization in the USA regarding alleged domestic violence. While dated after the RPD's rejection of their claim, the letter purports to describe alleged incidents of abuse by the ex-husband in 2017. The RAD rejected it because the evidence referred to events that predated the negative decision of the RPD. Again, this finding was open to the RAD on the facts and applicable law. In any event the letter, to the extent it recounts events the Principal Applicant told a case worker, is to be viewed with caution: see *Demberel v. Canada (Citizenship and Immigration)*, 2016 FC 731 [Kane J] states:

> [47] The jurisprudence has cautioned that the recounting of events to a psychologist or a psychiatrist does not make these events more credible and that an expert report cannot confirm allegations of abuse. For example, in *Rokni v Canada (Minister of Citizenship*

> *and Immigration)*, [1995] FCJ No 182 (QL) at para 16, 53 ACWS (3d) 371 (FCTD) and *Danailov v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 1019 (QL) at para 2, 44 ACWS (3d) 766 (FCTD), the Court noted that such reports cannot possibly serve as a cure-all for deficiencies in a claimant's testimony and that opinion evidence is only as valid as the truth of the facts upon which it is based. The same caution was noted by Justice Phelan in *Saha v Canada (Minister of Citizenship and Immigration)*, 2009 FC 304 at para 16, 176 ACWS (3d) 499:
>
> > It is within the RPD's mandate to discount psychological evidence when the doctor merely regurgitates what the patient says are the reasons for his stress and then reaches a medical conclusion that the patient suffers stress because of those reasons.
>
> [Emphasis added]

[37] In addition, the RAD concurred with the RPD and reasonably found that the Principal Applicant was not credible in relation to fundamental elements of her account of the abuse. The RAD also found there was no explanation why the new information regarding the assaults was not mentioned at the RPD. With respect, these findings were open to the RAD on the record and the constraining law set out by Parliament and the Federal Court of Appeal in *Singh*.

[38] More generally and in connection with these documents, the Applicants urge this Court to follow *Elezi v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 240 [*Elezi*], per Justice de Montigny (as he then was):

> [45] If Canada is to respect its international obligations and abide by its *Canadian Charter of Rights and Freedoms* [being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]], it cannot disregard credible evidence that a person would be at risk if sent back to his or her country of origin on the sole basis that this evidence is technically inadmissible. Such a narrow interpretation of paragraph 113(*a*) would make a mockery of our most fundamental commitments. It would also be incompatible with Parliament's

> objectives about how the *IRPA* is meant to be construed and applied. I am therefore in full agreement with Lorne Waldman when he writes, in his book *Immigration Law and Practice* (2nd ed., loose-leaf), at § 9.499:
>
> > Finally, I would argue that the nature of the evidence itself should also be considered. If the evidence is highly probative of the case and is credible evidence, then the officer should generally exercise his or her discretion in favour of receiving the evidence because of the importance of the issues at stake. In the final analysis, if there is credible evidence that a person is at risk of torture, then any attempt to remove the person to that country would be a violation of s. 7. I doubt that any court would countenance removal in those circumstances, even if there were some failure on the part of the applicant to obtain the information at an earlier stage in the process.

[39] With a very great deal of respect, these reasons were considered by the Federal Court of Appeal in Singh, which is binding on me. In *Singh*, the Federal Court of Appeal determined that *Elezi* is no longer authoritative.

[40] As a consequence of the following paragraphs in *Singh*, I am unable to agree with the Applicants:

> [36] The respondent and intervener relied on *Elezi v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 240, [2008] 1 F.C.R. 365 [*Elezi*] and, to a lesser extent, on *Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 101, [2009] F.C.J No. 101, to argue that the RAD may take into account the probative value and credibility of evidence in order to counteract the requirements of subsection 110(4). With respect, I am unable to agree with this interpretation.
>
> [37] I would first note that *Elezi* was issued nine months before the Court of Appeal's ruling in *Raza*, and is therefore no longer authoritative insofar as it departs from this later decision. In addition, in *Elezi*, the PRRA officer's decision not to admit some

> of the evidence was deemed to be unreasonable either because the evidence arose after the RPD's decision, or because the applicant could not reasonably have been expected to present that evidence to the RPD in the circumstances. As a result, the assertion that one cannot reject credible evidence on the sole ground that it is "technically inadmissible" must be considered purely as an *obiter*.

B. *Credibility Findings*

(1) Mental Health Diagnosis

[41] The RAD found that the Principal Applicant's "diagnosis is not the reason behind her inability to provide credible evidence". The RAD noted the evidence submitted before the RAD was not provided by a practitioner capable of making a diagnosis, i.e. a doctor. The RAD found the RPD did not sufficiently discuss the information provided by the nurse practitioner's report. The RAD engaged, as required, in its own analysis of this evidence by reviewing the documentary evidence and audio hearing. The RAD noted the Applicant "is a well-spoken woman. She did not give the impression that she was reluctant to testify or unable to testify due to medical, cultural, religious or social grounds" and found "on a balance of probabilities, that her diagnosis is not the reason behind her inability to provide credible evidence."

[42] The RAD's determination in this respect is a question of fact and evidence. The Applicants once again invites the Court to reweigh the evidence and reassess it with a view to finding in their favour. Again and with respect that is a matter which the Supreme Court of Canada directs me not to do unless there are exceptional circumstances. There are no such circumstances here.

[43] Indeed, I disagree with the proposition that a first instance trier of fact is prevented by law from drawing conclusions on the veracity of a witness before it. With respect, to say that is to discount the core value-add of first level decision-makers in assessing credibility. That is not the law. Instead, this is an area in which, as the Federal Court of Appeal has decided, such tribunals have a real advantage over those subsequently conducting a review based only on the record. Relying on such evidence is not to be discounted or ignored, but is precisely the sort of situation where the first level trier of fact has an meaningful advantage over the appeal tribunal as stated in *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93 [Gauthier JA] [*Huruglica*]:

> [70] This also recognizes that there may be cases where the RPD enjoys a meaningful advantage over the RAD in making findings of fact or mixed fact and law, because they require an assessment of the credibility or weight to be given to the oral evidence it hears. It further indicates that although the RAD should sometimes exercise a degree of restraint before substituting its own determination, the issue of whether the circumstances warrant such restraint ought to be addressed on a case-by-case basis. In each case, the RAD ought to determine whether the RPD truly benefited from an advantageous position, and if so, whether the RAD can nevertheless make a final decision in respect of the refugee claim.

[44] I note the RAD explored the conduct of the RPD and found that during her testimony, the Principle Applicant was offered many opportunities to explain her evidence, was offered breaks and the RPD showed its empathy for the events recounted.

[45] It is true to say that each case is ultimately determined on its facts. In my respectful view, and while I recognize the usefulness of examples, I am not persuaded that the results of other cases ought to be transposed and applied in the case at bar. See: *Atay v Canada (Citizenship and Immigration)*, 2008 FC 201 [O'Keefe J]; *Akter v. Canada (Minister of Citizenship and*

Immigration), 2006 FC 1205 [Beaudry J]; *Akhigbe v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 249 [Dawson J]; *Feradov v Canada (Minister of Citizenship and Immigration)*, 2007 FC 101 [Barnes J]. Instead, I am obliged to avoid reassessing and reweighing the evidence, which with respect, is what many of the Applicants' arguments request.

(2) Photograph Regarding Alleged Abuse

[46] The RAD determined it was unable to conclude the photograph evidence before the RPD showed the Principal Applicant had bruises on her eyes. The Applicants' submit the RAD did not review the original photographs as the RPD did. The RAD relied on the photocopies in the record and deferred to the RPD's analysis because "the RPD had an opportunity to examine the original photographs. I find that they had a meaningful advantage in reviewing the photographs, specifically they were able to view a clearer version of the photographs than I. The clarity of their photograph attracts deference."

[47] The Applicants submit it is not surprising the RAD was unable to identify any significant injuries based on the photocopies. The RAD could have requested clearer copies but did not. The Applicant submits this "was not a situation where the RAD panel was compelled to defer to the RPD; rather, it is one where the RAD was simply unwilling to engage with the evidence". I take this to mean the RAD should have reviewed the originals because the Applicants submit the RAD did not reasonably assess the evidence. I disagree. It is settled law as just noted that the RAD may defer to the RPD where the latter has a meaningful advantage.

[48] Here, it is reasonable to conclude the RPD had a meaningful advantage. This is exactly the situation contemplated and authorized by the Federal Court of Appeal in *Huruglica* at para 70. There is no merit in the Applicants' suggestion the RAD should have reviewed the original photographs; it was entitled to and in my view reasonably deferred to the RPD.

(3) RPD finding that the minor Applicants are not at risk for traditional rituals

[49] The RAD found:

> [22] Finally, even if I accepted the Appellants' argument about the photographs and the court documents, I agree with the ultimate conclusion of the RPD that the Appellants have not established the fundamental elements of their claim: that the minor Appellants are at risk for traditional rituals if they were to return to Nigeria and that Mrs. Owolabi is at future risk for domestic violence if she was to return to Nigeria. Mrs. Owolabi testified that she has no contact with her husband, that she doesn't know his whereabouts, that he has blocked her calls and that she has sole legal custody of the children. There is no evidence before me on which to conclude that the husband has the interest or motivation to contact the Appellants. On the evidence before me, sympathetic though I am for Mrs. Owolabi's loss of her son, I find that the Appellants have not established that they have a prospective risk of persecution or harm from the alleged agents of persecution and harm.

[50] The Applicants' submit the aforementioned risks are not the only risk they face in Nigeria, pointing to the National Documentation Package on Nigeria [NDP]. The NDP contains information about gender-based violence that women, specifically single women, face in Nigeria. This was evidence considered during the RPD hearing and therefore forms part of the record. This specific argument was not advanced by the Applicants in her BOC, before the RPD or before the RAD – the Applicants were represented by counsel at all three stages. The Applicants and their counsel chose to advance this argument only on judicial review.

[51] The Respondent submits the onus is on the Applicants to present evidence to substantiate their claim, particularly when represented by counsel. If the Applicants believed the Principal Applicant would be at risk if she returned to Nigeria as a single woman, it was incumbent on them to present that evidence to the RPD and the RAD to be properly assessed.

[52] The Respondent submits, and I agree, it is not appropriate for the Applicants to impugn the Decision based on an issue they had not previously raised. In this case they now raise a new argument. With respect, I decline to consider this new argument because of jurisprudence to the effect that new argument not argued below should not be advanced for the first time in the Federal Court on judicial review, see: *Dhillon v Canada (Citizenship and Immigration)*, 2015 FC 321 [LeBlanc J, as he then was]:

> 23 Finally, the Applicants' position is at odds with the principle often acknowledged by this Court, to the effect that an issue not raised before an administrative tribunal cannot be examined in judicial review proceedings before the Court (*Mohajery c. Canada (Ministre de la Citoyenneté & de l'Immigration*), 2007 FC 185 (F.C.), at para 28). The Federal Court of Appeal, in *Guajardo-Espinoza v. Canada (Minister of Employment & Immigration)*, [1993] F.C.J. No. 797 (Fed. C.A.), at para 5, stressed the importance of that principle in the following terms:
>
> > As this Court recently said in *Pierre-Louis [sic] v. M.E.I.*, [F.C.A., No. A-1264-91, April 29, 1993.] the Refugee Division cannot be faulted for not deciding an issue that had not been argued and that did not emerge perceptibly from the evidence presented as a whole. [*Ibid*., at 3.] Saying the contrary would lead to a real hide-and-seek or guessing game and oblige the Refugee Division to undertake interminable investigations to eliminate reasons that did not apply in any case, that no one had raised and that the evidence did not support in any way, to say nothing of frivolous and pointless appeals that would certainly follow.

> 24 This principle applies equally to the RAD which, like the RPD, is an administrative tribunal subject to the supervisory power of this Court pursuant to section 18 of the *Federal Courts Act*.

[53] To the same effect, I also respectfully rely on the judgment of Justice Zinn in *Dovha v Canada (Citizenship and Immigration)*, 2016 FC 864:

> 10 In summary, the RAD had no obligation to consider a ground not raised in the appeal document filed by Mr. Dovah, and the ground he now alleges it failed to consider was not before the RPD or the RAD on the materials he filed with his claim.

(4) Credibility findings regarding the deceased son

[54] The RAD found the Principal Applicant not credible in relation to her amplified evidence concerning the death of her son. On this (and on her allegation of spousal abuse) the RAD said:

> [17] More specifically, I have considered whether the lapses and contradictions in her testimony might have been related to Mrs. Olowabi's (sic) anxiety, nightmares and depression, consistent with the symptoms of PTSD cited by her psychotherapist. In reviewing the audio evidence, it was clear to me that the difficulties experienced by the Principal Appellant did not stop her from delivering her evidence. The Appellant was not vague about the risks of traditional rituals, nor was she unclear about who was behind the threat. She was clear that her husband changed his demeanor after the death of their son. Her testimony evolved throughout the hearing on several points, for example what happened after the death of her son, whether she went to the police and what they agreed to do in relation to the death of her son. The RPD gave Mrs. Olowabi (*sic*) multiple opportunities to try to explain her evidence. She was offered breaks during her testimony by the RPD Member which she declined. <u>In the written reasons, the showed its empathy for the events recounted by Mrs. Olowabi (sic) when she wrote, "The circumstances are violent and appalling. The inhumanity is shocking."</u> Unfortunately, even if the mental health issues of Mrs. Olowabi (sic) affected her testimony, this diagnosis does not remedy the multitude of contradictions in the evidence, such as the missing account of being locked in a room for a week with a dying child and the inconsistent court

> documents. I find that, while the Principal Appellant's reports of abuse to various practitioners support her credibility, they must be taken in the context of the uneven evidence given at the RPD hearing where the express purpose was to test credibility. Although I respect these professionals' opinions, I find, on a balance of probabilities, that Mrs. Olowlabi's (sic) diagnosis is not the explanation for her uneven testimony. I find, on a balance of probabilities, that her diagnosis is not the reason behind her inability to provide credible evidence.
>
> [Emphasis added]
>
> …
>
> **Scarification rituals**
>
> [24] It is striking to me that the Appellants do not contest the credibility findings of the RPD in relation to the death of Mrs. Owolabi's son. These allegations were the original basis for this claim. Having reviewed the RPD decision, the audio recording and the documentary evidence, I adopt the RPD's conclusions that the Appellants are not credible in their allegations of a well-founded fear of persecution under section 96 or within the meaning of section 97(l) of the Act in relation to the scarification rituals alleged to be committed on the minor Appellants.
>
> [Emphasis added]

[55] The Applicants also argue that the emphasized portion of the paragraph 24 above is "clearly and demonstrably untrue". In their submissions to the RAD, the Applicants say they had in fact criticized the RPD's assertion that they did "not contest the credibility findings of the RPD in relation to the death of Mrs. Owolabi's son." I agree with the Applicants; this was argued before the RPD. The RAD misspoke.

[56] But I am not persuaded the RAD made any unreasonable finding in connection with the death of the son. Once again the Applicants ask me to reweigh and reassess the relevant evidence in this respect, which I am directed not to do except in exceptional circumstances, which are not

here. This is another disagreement with a finding open to the RPD on the record before it and governing law. The Applicants made very material additions to her BOC in oral testimony before the RPD, and in my respectful finding it was open to the RAD to find as it did, including the rejection of her explanation for the omissions from her BOC.

VII. Conclusion

[57] In my respectful view, the Applicants have not shown that the Decision of the RAD was unreasonable. The RAD reasonably assessed the new evidence, and provided reasons that were justified, transparent and intelligible. It did the same in relation to the many credibility issues considered, again providing a rational chain of analysis. There is no fatal error. The reasons add up, and the results follow the facts. Giving the decision respectful attention and deference, as I must, and considering it as a whole, I conclude the reasons are justified, transparent and intelligible. Therefore judicial review must be dismissed.

VIII. Certified Question

[58] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-7861-19

THIS COURT'S JUDGMENT is that judicial review is dismissed, no question is certified, and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7861-19
STYLE OF CAUSE:	JUSTINA OLUWAKEMI OWOLABI, MOSHOOD RICHARD OWOLABI – MINOR, ABDUL MALIK RAY OWOLABI - MINOR v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

HEARING HELD BY VIDEOCONFERENCE ON DECEMBER 15, 2020 FROM OTTAWA, ONTARIO (COURT) AND TORONTO, ONTARIO (PARTIES)

JUDGMENT AND REASONS:	BROWN J.
DATED:	JANUARY 4, 2021

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