

Federal Court



Cour fédérale

**Date: 20210412**

**Docket: IMM-7763-19**

**Citation: 2021 FC 316**

**Ottawa, Ontario, April 12, 2021**

**PRESENT: The Honourable Mr. Justice Southcott**

**BETWEEN:**

**AKINWALE OLANREWAJU DAODU  
OLUWASEYI DOLAPO DAODU  
OLUWAFERANMI REBECCA DAODU  
SAMUEL OLUWADAMILOLA DAODU  
EMMANUEL OLUWADARASIMI DAODU**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Overview**

[1] This is an application for judicial review of a decision by the Refugee Appeal Division of the Immigration and Refugee Board of Canada [RAD] dated November 29, 2019 [the Decision].

In the Decision, the RAD dismissed the Applicants' appeal and confirmed the decision of the

Refugee Protection Division [RPD] that the Applicants are not Convention refugees or persons in need of protection under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] As explained in more detail below, this application is allowed, because the Applicants were not afforded the requisite procedural fairness in connection with their appeal to the RAD. The RAD's Decision to dismiss the appeal was influenced by a material adverse credibility determination on a new question to which the Applicants were not given an opportunity to respond.

## II. **Background**

[3] The Applicants are Oluwaseyi Dolapo Daodu [the Principal Applicant], her husband, and their three children, all of whom are citizens of Nigeria. The Applicants claimed refugee protection in Canada based on a fear that the Principal Applicant's father's family was violently pursuing her and her daughter to perform a traditional rite. The RPD and RAD dismissed the Applicants' claim based on negative credibility findings.

## III. **RPD Decision**

[4] The Applicants' claim for refugee protection is based on the allegation that the Principal Applicant's father's family have threatened her because she failed to take up the role of Eledan (a traditional role in their culture and religion) and perform related ritual rites. In rejecting the Applicants' claim, the RPD concluded that credibility was the determinative issue. The RPD did not believe that the family would force the Principal Applicant to perform this role. It found that

the Principal Applicant had not established that her father was born Muslim but married a Christian woman, a marriage that his family did not accept. The RPD also reasoned that, because his family did not force the Eledan role on him, they would not resort to violence against his daughter to do so.

[5] The RPD also doubted the Applicants' allegation that the family had previously attacked them, causing the death of their infant child. It based this conclusion on the lack of corroboration in the relevant medical report and the fact that the Applicants did not submit a police report in support of their claim. Finally, the RPD noted that the Applicants continued to live in their home for a period following the alleged attack and left Nigeria only several months after they obtained visas to do so. It considered this behaviour to be incompatible with the alleged fear.

#### IV. **Appeal to RAD**

[6] In appealing this decision to the RAD, the Applicants challenged the RPD's credibility conclusions. They argued that the RPD erred in its treatment of the medical report and the police report, as well as the Applicants' return to their home and delay in leaving Nigeria. They also argued that the RPD erred in its analysis of the evidence surrounding the father's conversion to Christianity. With respect to the family forcing the Principal Applicant to assume the role of Eledan, the Applicants submitted that the RPD's analysis, that the father had not been forced into this role, was flawed because the position of Eledan had passed to the Principal Applicant as his first daughter.

V. **RAD Decision**

[7] The RAD rejected these grounds of appeal. It found that the RPD's findings in relation to the father's conversion to Christianity, and the resulting disapproval of his family, were peripheral to the central allegation. Nevertheless, the RAD found that the Applicants had not established their allegations surrounding the traditional practices and role of Eledan. The RAD found the Principal Applicant's testimony surrounding this role to be inconsistent and evolving. It found her testimony not to be credible and concluded that the Applicants had not established that this role accrued to the first daughter.

[8] The RAD also concluded that the Principal Applicant was not actually her father's first daughter, as the information supplied in her Basis of Claim form [BOC] indicated that she had two older sisters. On this basis, the RAD found the Principal Applicant's testimony to be not credible and deserving of no weight. It also made a negative inference as to her general credibility, because the inconsistency was significant, serious and central to the Applicants' claims. The RAD agreed with the RPD that the evidence did not support a conclusion that the father was pursued to carry out the traditional practices. As such, the Applicants had not established that the Principal Applicant was being pursued by her father's family.

[9] The RAD also rejected the Applicants' arguments surrounding the medical report regarding their baby's death, the lack of a police report, and the Applicants' delay in leaving their home and Nigeria. It concluded that the Applicants were not credible and had not established the allegations on which their claim was based.

VI. **Issues and Standard of Review**

[10] The Applicants argue that the RAD erred by making findings of fact without evidence, ignoring relevant evidence, misinterpreting evidence, making erroneous findings of fact, and placing reliance on irrelevant evidence. These allegations are reviewable on a reasonableness standard.

[11] The Applicants also argue that the RAD breached its obligations of procedural fairness by making an adverse finding as to the Principal Applicant's general credibility, on an issue that had not been raised by the RPD, without advising the Applicants about its concerns on this issue and giving them an opportunity to respond to those concerns. This allegation is reviewable on a standard of correctness.

VII. **Analysis**

[12] My decision to allow this application for judicial review turns on the procedural fairness issue. This issue arises from the RAD's adverse credibility determination based on the evidence that the Principal Applicant was not her father's first daughter. She has filed an affidavit in support of this application for judicial review, in which she explains that her two elder sisters were adopted and therefore are not eligible to assume the role of Eledan. She has also attached a copy of an "adoption affidavit", documenting the adoptions. The Principal Applicant argues that the RAD breached its obligations of procedural fairness by basing its decision on an adverse credibility finding on this issue without giving her an opportunity to address the issue. She says

that, if she had been afforded that opportunity, she could have eliminated the credibility concern by explaining that her sisters were adopted.

[13] The Respondent takes the position that the RAD had no obligation to notify the Applicants about this credibility concern, because credibility was an issue in the RPD's decision and was the subject of the Applicants' appeal submissions. Therefore, the Applicants were aware that credibility was a live issue and, even though the RAD made a credibility finding independent of those of the RPD, it was entitled to do so without giving advance notice to the Applicants.

[14] Counsel have made capable submissions on the jurisprudence governing this issue. They agree that there are authorities which, at least at first glance, appear capable of supporting both parties' positions on the issue.

[15] One of the earlier cases identified in the Applicants' submissions is *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 [*Ching*], in which Justice Kane considered the scope of an appellate court's jurisdiction to raise new issues on appeal, in a criminal law context, and applied those principles to the administrative law context involving the RAD. Justice Kane explained that the RAD should consider whether an issue is "new" and, if it pursues a new issue, procedural fairness requires that the affected party or parties be given notice and an opportunity to make submissions (at para 71). Expressed somewhat more colourfully, Justice Hughes found in *Husian v Canada (Citizenship and Immigration)*, 2015 FC 684 at para 10, that "... if the RAD

chooses to take a frolic and venture into the record to make further substantive findings, it should give some sort of notice to the parties and give them an opportunity to make submissions.”

[16] These principles have been applied to find a breach of procedural fairness where the RAD has made a credibility finding without that specific credibility issue having been raised by the RPD or by the parties on appeal to the RAD (see, e.g., *Fu v Canada (Citizenship and Immigration)*, 2017 FC 1074; *He v Canada (Citizenship and Immigration)*, 2019 FC 1316).

[17] On the other hand, the Respondent identifies authorities to the effect that, when credibility was a basis for the RPD’s decision, the RAD is free to make new independent credibility assessments without giving the parties advance notice and an opportunity to make submissions (see, e.g., *Oluwaseyi Adeoye v Canada (Citizenship and Immigration)*, 2018 FC 246 at paras 11-13; *Marin v Canada (Citizenship and Immigration)*, 2018 FC 243 at para 37; *Corvil v Canada (Citizenship and Immigration)*, 2019 FC 300 [*Corvil*] at para 13). For instance, in *Corvil*, Justice LeBlanc held (at para 15):

15. Given the current state of the Court’s case law, the RAD cannot be criticized for raising a piece of evidence on the record, but which appeared to have escaped the RPD’s attention, and drawing a negative inference therefrom about the applicant’s credibility, without giving the applicant an opportunity to explain himself given that the applicant’s credibility was the central issue of the appeal filed by the applicant.

[18] Helpfully, the parties have also identified cases that assist in explaining the divergent results in these authorities. In *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 [*Kwakwa*], Justice Gascon accepted that the RAD is entitled to make independent findings of

credibility or plausibility against an applicant, without putting it before the applicant and giving him or her the opportunity to make submissions, but observed that this holds only for situations where the RAD does not ignore contradictory evidence or make additional findings or analyses on issues unknown to the applicant (at para 24). Employing the language of *Ching*, Justice Gascon also explained that a “new question” is one which constitutes a new ground or reasoning on which a decision-maker relies, other than the ground of appeal raised by the applicant, to support the valid or erroneous nature of the decision appealed from (at para 25).

[19] In finding a breach of procedural fairness on the particular facts of that case, *Kwakwa* concluded as follows (at para 30):

30. I acknowledge that there is a fine (and sometimes blurred) line between situations where the RAD raises and deals with a “new question” and those where it simply makes reference to an additional piece of evidence on the record to support an already existing conclusion of the RPD on a factual assessment or on a credibility issue. Sometimes, these factual or credibility issues have been dealt with extensively by the RPD in its decision or by the applicant in his or her representations. In the current case, however, I am not persuaded that the issues retained by the RAD in support of its adverse decision against Mr. Kwakwa were properly put to Mr. Kwakwa to allow him to address them. Neither were they so central to the RPD decision and to the appeal filed by Mr. Kwakwa that it could be assumed that Mr. Kwakwa was necessarily aware of them.

[20] In *Nuriddinova v Canada (Citizenship and Immigration)*, 2019 FC 1093, Justice Walker adopted the articulation from *Kwakwa* of the nature of a new question or issue that gives rise to procedural fairness requirements (at para 47) and provided the following additional guidance (at para 48):



48. I agree with the Applicants that the issue of credibility is very broad and that the RAD cannot have *carte blanche* to identify any new credibility issue. However, the Applicants raised the issue of Ms. Nurridinova's testimony broadly, stating that it was "consistent, uncontradicted, plausible and corroborated". The RAD directly addressed this ground of appeal, highlighting inconsistencies between her BOC and testimony, and Mr. Nurridinov's testimony, that arose from questions posed by the RPD. As a result, I find that the RAD did not raise a new question in support of its decision and did not breach the Applicants' right to procedural fairness.

[21] In his recent decision in *Bouchra v Canada (Citizenship and Immigration)*, 2020 FC 1063, Justice Roy canvassed a number of the authorities, including the decision in *Corvil*, and arrived at the following conclusions (at paras 25-26):

25. That said, with respect, I am not satisfied that the case law cited in *Corvil*, or more recent case law created by this Court, is now so well established that any new finding of credibility by the RPD opens the door to a whole new assessment before the RAD without it ever warning the appellant who has raised a narrow issue. Even in a case invoking *Corvil*, this Court noted that the facts relied on on appeal had been raised before the RPD. In *Antunano Martinez v Canada (Citizenship and Immigration)*, 2019 FC 744, the Court states at paragraph 17:

[17] It is not necessary to analyze this argument in detail. First, I believe that credibility was at the heart of the RPD's concerns, and that the RAD did not err in making an independent analysis of this issue. Second, I agree with the respondent's arguments that most of the RAD's analysis on this issue focuses on facts that the RPD had already addressed. Although the RAD rejected some of the RPD's findings on the credibility of the applicants, the facts pointed out by the RAD to support its negative credibility finding were initially raised in the RPD's decision.

[Emphasis added.]

As can be seen, the nuance being made here is that the RAD's decision was a continuation of the facts dealt with by the RPD.

26. The question of what findings should be made by the RAD about an applicant's credibility is therefore not without nuance. In my view, the case law of this Court is not monolithic, and the specific facts continue to be relevant. Depending on the case, an applicant's credibility may take on a different colour, and the new issue may require not a new hearing, but rather submissions from the applicant.

[22] Justice Roy proceeded to adopt Justice Gascon's explanation in *Kwakwa* of the fine and sometime blurred line between situations where the RAD raises a "new question" and those where it simply makes reference to an additional piece of evidence on the record to support an already existing conclusion of the RPD on a factual assessment or on a credibility issue (*Bouchra* at paras 29-30). Applying that analysis to the facts before him, Justice Roy concluded as follows (at para 33):

33. In my opinion, the fine and blurred line from *Kwakwa* may well have been crossed. The issues raised by the RAD are considerably more significant than those raised by the RPD. The applicant argued on appeal that the RPD could not reach the conclusions it did on such tenuous grounds. This seemed to be echoed by the RAD, which identified several additional elements to support its conclusion; elements that it considered probative without the benefit of the applicant's submissions. The final decision is very different, with further explanation, which could make it a reasonable decision under *Vavilov* in that it is justified, transparent and intelligible. The reasoning has been improved, which might lead to the conclusion that it is internally coherent; it may be harder to call the decision untenable for one reason or another. While the applicant based her appeal on insufficient justification for the conclusion, the RAD identifies elements that the RPD ignored in reaching that conclusion. But this is a different decision, taking into account elements that were not considered by the RPD.

[23] In my view, the authorities relied on by the parties in support of their respective positions do not demonstrate a divergence in jurisprudential principles. Rather, the divergent results in those authorities represent the application of basic principles of procedural fairness to different sets of facts, falling on both sides of Justice Gascon's fine and sometimes blurred line. As noted by Justice Roy, the analysis as to which side of the line a particular set of facts falls can be a nuanced one.

[24] In approaching that nuanced determination, it is useful to return to Justice Kane's decision in *Ching*, which relied upon the criminal case of *R v Mian*, 2014 SCC 54 at para 30, where the Supreme Court of Canada referred to genuinely new issues as those that are legally and factually distinct from the grounds of appeal raised by the parties. Also instructive is Justice Kane's articulation of the underlying principle of procedural fairness, that a party should have an opportunity to respond to issues and concerns that will have a bearing on a decision affecting them (*Ching*, at para 74).

[25] Applying this basic analytical framework to the case at hand, I agree with the Applicants that procedural fairness entitled them to notice of the RAD's concern, that the Principal Applicant was not her father's first daughter, before the RAD relied on that concern to impugn her general credibility. While the RPD stated that credibility was the determinative issue in its rejection of the Applicants' claim, the bases for the RPD's credibility concern were factually distinct from the question of whether the Principal Applicant was the first daughter.

[26] The RPD's credibility concerns arose from factors including the Applicants' failure to obtain documentation of their report to the police following death of their child, the failure to mention this report in the BOC, their delay in leaving their home, and their delay in leaving Nigeria. None of these factors bears any relationship to the question whether the Principal Applicant was the first daughter. The RPD also had credibility concerns surrounding the assertions that the Principal Applicant's father was born Muslim but married a Christian woman and that the family disapproved of their marriage. However, the RAD concluded this finding was peripheral to the Applicants' central allegations.

[27] This leaves two paragraphs of the RPD's decision, in which it considered the Principal Applicant's evidence in response to the RPD's questioning about whether her father had ever carried out the Eledan rites or been targeted by his family for failure to do so. The Principal Applicant testified that the family preferred that she perform the rites, instead of her father. The RPD did not find this explanation convincing. It reasoned that the fact the Principal Applicant's father's family did not attempt to forcibly impose the traditional roles on him tended to demonstrate that they would not resort to violence to express their discontent against his daughter.

[28] The RPD's credibility analysis related to the broad issue of whether the Applicants had established that the family would force the Principal Applicant to perform the traditional rites. The credibility concern raised by the RAD, that the Principal Applicant was not her father's first daughter, relates to the same broad issue. However, this concern is factually distinct from the bases for the credibility concerns raised by the RPD.

[29] In my view, this credibility concern is also factually distinct from the grounds of appeal raised by the Applicants before the RAD. The Applicants challenged the RPD's credibility findings on several bases. The only argument touching on the issue at hand was the Principal Applicants' assertion that the RPD failed to assess the evidence that her father was no longer the family's target, because the position of Eledan was hers as the first daughter. While this argument relies on the fact that the Principal Applicant is the first daughter, that fact had not itself been in contention before the RPD. I cannot conclude that the Applicants could have anticipated the RAD's concern that the Principal Applicant was not actually the first daughter. Therefore, she could not have known to provide the RAD with the explanation that her older sisters were adopted. Applying the principle that parties should have an opportunity to respond to concerns that will have a bearing on a decision affecting them, I find that the Applicants did not have that opportunity in the case at hand.

[30] I have considered the Respondent's argument that, regardless of whether procedural fairness requirements were met in this case, the RAD's conclusion that the Principal Applicant is not the first daughter was not central to its decision. The Respondent emphasizes that the RAD identified several other bases for its conclusion that the RPD did not err in its determination that the Applicants failed to credibly establish their allegations on a balance of probabilities.

[31] However, in finding that the Principal Applicant was not in fact the first daughter, the RAD described this fact as being at the heart of the Applicants' claim. As a result, the RAD found that the Principal Applicant's testimony was not trustworthy and made a negative inference as to the Principal Applicant's general credibility. The RAD further described the

inconsistency as significant, serious and central to the Applicants' claims. I also note that, in arriving at its subsequent endorsement of the RPD's conclusion that the Applicants had not established that the alleged violent attack was at the hands of the Principal Applicant's father's family, the RAD relied in part on its adverse determination as to her general credibility. I therefore agree with the Applicants' position that the Decision demonstrates the impugned credibility conclusion was significant to the outcome of the appeal.

[32] In summary, I find that the Applicants were deprived of the required procedural fairness, that this error was material to the outcome of the appeal before the RAD, and that the Decision must therefore be set aside and returned to the RAD for redetermination. It is therefore unnecessary for me to address the parties' arguments surrounding the reasonableness of the Decision.

#### VIII. **Proposed Certified Question**

[33] The Applicants propose the following question for certification for appeal pursuant to s 74(d) of IRPA:

If there is a credibility concern arising on evidence that the RPD did not directly address as a credibility concern, can it be raised by the RAD as justification of refusal without permitting the Applicant to respond in writing or by way of oral hearing?

[34] In reference to the test for certifying a question for appeal, the Applicants submit that this question is both dispositive of the matter at hand and a serious question of general importance that transcends the parties' interests in this case. In support of the latter position, they argue that the case law on the procedural fairness issue articulated in the proposed question is mixed and

would benefit from appellate clarification. The Respondent opposes certification, arguing that it fails both elements of the test for certification.

[35] The Respondent submits that the question is not determinative of this judicial review, because the RAD's Decision is sustainable regardless of whether the Applicants were deprived of procedural fairness. I have considered and rejected that argument in my above analysis of the merits of the judicial review.

[36] However, the Respondent also argues that the proposed question fails the test for certification because the outcome of the procedural fairness issue captured in the question turns on the unique facts of this case. As such, the question is not one of general application that transcends the parties' interests in this case.

[37] I would not rule out the possibility that the Court may in another case be presented with circumstances where what the Applicants refer to as the "mixed" case law, on the procedural fairness issue addressed in this decision, could give rise to a question suitable for certification for appeal. However, the outcome of the present matter turns very much on the application of principles of procedural fairness to the particular circumstances of this case. I therefore agree with the Respondent that the proposed question is not appropriate for certification in this case.

**JUDGMENT IN IMM-7763-19**

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

1. This application is allowed, the decision of the Refugee Appeal Division is set aside, and the matter is returned to a differently constituted panel of the Refugee Appeal Division for redetermination.
2. No question is certified for appeal.

"Richard F. Southcott"

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Judge



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

**DOCKET:** IMM-7763-19

**STYLE OF CAUSE:** AKINWALE OLANREWaju DAODU  
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SAMUEL OLUWADAMILOLA DAODU  
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v THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

**PLACE OF HEARING:** HEARD BY VIDEOCONFERENCE VIA TORONTO

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**DATED:** APRIL 12, 2021

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