

Federal Court



Cour fédérale

Date: 20210622

Docket: IMM-1633-20

Citation: 2021 FC 642

Ottawa, Ontario, June 22, 2021

PRESENT: Mr. Justice McHaffie

BETWEEN:

**DORCAS OLUWATOM ABIODUN
SERAH DAMILOLA ABIODUN
JOSEPH KAYODE ABIODUN**

Applicants

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Dorcas, Serah, and Joseph Abiodun are siblings in their late teens and twenties who allege they fled Nigeria due to political, religious, and gender-based persecution. On this application for judicial review, the Abioduns challenge two aspects of the February 13, 2020 rejection of their appeal by the Refugee Appeal Division (RAD). First, they say it was unfair for

the RAD to impugn their credibility based on alleged inconsistencies between their testimony and their Basis of Claim (BOC) narrative without either the Refugee Protection Division (RPD) or the RAD having put those alleged inconsistencies to them. Second, they say the RAD applied the wrong legal standard or analysis in dismissing their fear of persecution from voodoo practices in Nigeria.

[2] I conclude the first of these arguments is well founded and is determinative of this application. The RPD failed to address the religious persecution aspect of the Abioduns' refugee claim. The RAD corrected that error by considering the ground, but rejected it on the basis there was insufficient credible evidence to establish religious persecution. In doing so, the RAD found it did not have to confront the Abioduns with inconsistencies it discerned between Dorcas Abiodun's oral testimony and the Abioduns' BOC narrative. I conclude the record does not provide a basis for the RAD's finding that there were "readily apparent" inconsistencies. As a result, the RAD's conclusions stemming from that finding, both on procedural fairness and on the merits of the appeal, cannot be sustained.

[3] As for the Abioduns' second argument, counsel fairly conceded at the hearing of this application that it was not sustainable given the nature of the Abioduns' asserted fears, which were that the agents of persecution could use charms or voodoo to harm them and their parents even if they could not physically see them.

[4] The application is allowed and the matter remitted to the RAD for redetermination of the Abioduns' appeal.

II. Issues

[5] The Abioduns raise two issues with the RAD's decision on this application:

- A. Did the RAD err by failing to confront the Abioduns with alleged inconsistencies and contradictions in their testimony?
- B. Did the RAD apply the wrong standard in assessing the Abioduns' fear of persecution from voodoo practices?

III. Analysis

A. *The RAD erred in failing to confront the Abioduns*

(1) Standard of review

[6] This Court has typically viewed an alleged failure to put contradictory evidence to an applicant to be a matter of procedural fairness: see, e.g., *Akanniolu v Canada (Citizenship and Immigration)*, 2019 FC 311 at paras 29, 45–49; *Huang v Canada (Citizenship and Immigration)*, 2015 FC 905 at para 6. Such issues of fairness are reviewed by assessing “whether the procedure was fair having regard to all of the circumstances,” an approach considered to be either akin to a correctness standard or as having no standard of review: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35 [CARL].

[7] In the present case, as discussed further below, the RAD gave considered reasons why it found there was no requirement to put the evidence to the Abioduns, referring to and analyzing the factors set out in *Ngongo v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 8885 (FC). Where a tribunal provides written reasons on a procedural fairness matter, should the Court review the issue on the reasonableness standard? Professor Paul Daly has suggested it should as a functional matter, given the difficulty in classifying such a case as going to the “merits” or the “procedure”: P Daly, “Unresolved Issues after Vavilov” (delivered at the Hugh Ketcheson QC Memorial Lecture, November 18, 2020), available at SSRN: <https://ssrn.com/abstract=3732962> at pp 7–8, referring to *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

[8] As Professor Daly notes, and is clear from decisions of this Court, there are circumstances in which the line between procedure, substance, and statutory interpretation may be harder to see: see, e.g., *Khan v Canada (Citizenship and Immigration)*, 2019 FC 1515 at paras 34–39; *Idugboe v Canada (Citizenship and Immigration)*, 2020 FC 334 at paras 34–38; Daly at pp 7–8. The primary issue in this case has to do with how the RAD’s findings on the evidence affected the procedure to be followed, further complicating the assessment. Nonetheless, in my view, a question about whether a refugee claimant has had an adequate opportunity to present their case and respond to concerns about their evidence remains a question about the procedure followed to get to a decision, rather than one about the merits of the refugee claim itself.

[9] The Federal Court of Appeal has in decisions rendered after *Vavilov* applied the correctness standard to procedural fairness questions, even where an administrative tribunal has given reasons on the issue: *Langevin v Air Canada*, 2020 FCA 48 at paras 9–11; *Jog v BMO Bank of Montreal*, 2020 FCA 218 at paras 2, 4, 7, aff'g on this point 2019 FC 1326 at paras 20, 24–29. I believe I ought to follow this approach, although I recognize the Court of Appeal has not directly addressed the question of how a tribunal giving reasons on a procedural fairness matter might change the standard of review.

[10] The question ultimately remains whether the process was fair in the circumstances: *Canadian Pacific* at paras 54–56; *CARL* at para 35. At the same time, where this determination is in turn based on factual findings or an assessment of the evidence, those findings themselves continue to warrant deference: *Ma v Canada (Citizenship and Immigration)*, 2019 FC 392 at paras 16–17.

(2) The refugee claim and the RPD decision

[11] Part of the Abioduns' refugee claim pertains to incidents of harassment, vandalism, and violence at the church that was established by their father and where both of their parents were pastors. In their BOC narrative, the Abioduns state that the family realized that the church was established in "an environment that is filled with unbelievers," and that because of this, they had problems since these unbelievers "insisted that they don't want a church in the area." The Abioduns described a number of incidents of vandalism, as well as harassment of and attacks on church members, including themselves, which had occurred since the founding of the church in 2010.

[12] The RPD asked some questions at the hearing about the church and why parts of it were destroyed. However, in its reasons for rejecting the refugee claim, the RPD did not address the Abioduns' allegation that they were persecuted because of their church and religion.

(3) The RAD's decision

[13] The RAD found the RPD erred in not addressing the Abioduns' allegations of religious persecution. It then addressed whether it could determine these allegations without rehearing the evidence. In particular, it considered whether the RPD or the RAD was required to confront the Abioduns with inconsistencies it identified between Dorcas Abiodun's evidence and the BOC narrative. The RAD referred to Justice Tremblay-Lamer's decision in *Ngongo*, which recognized that in some cases, but not all, fairness requires that an identified contradiction be put to an applicant to allow them to address or explain it. Justice Tremblay-Lamer proposed six factors for consideration of when a discrepancy should be brought to the claimant's attention:

In my view, regard should be had in each case to the fact situation, the applicable legislation and the nature of the contradictions noted. The following factors may serve as guidelines:

1. Was the contradiction found after a careful analysis of the transcript or recording of the hearing, or was it obvious?
2. Was it in answer to a direct question from the panel?
3. Was it an actual contradiction or just a slip?
4. Was the applicant represented by counsel, in which case counsel could have questioned him on any contradiction?
5. Was the applicant communicating through an interpreter?
Using an interpreter makes misunderstandings due to interpretation (and thus, contradictions) more likely.
6. Is the panel's decision based on a single contradiction or on a number of contradictions or implausibilities?

[Emphasis added; *Ngongo* at para 16.]

[14] The RAD concluded the inconsistencies were “readily apparent,” that Ms. Abiodun spoke English well and that the Abioduns were represented by counsel. It therefore concluded neither the RPD nor the RAD was required to put the inconsistencies to Ms. Abiodun and that it could decide the allegations of persecution based on religion without rehearing the evidence.

[15] Having reached this conclusion, the RAD went on to address the allegations of religious persecution. In doing so, the RAD set out the inconsistencies in question, namely that Ms. Abiodun’s oral testimony at the refugee hearing explained the events involving the church differently than in the BOC narrative. According to the RAD, Ms. Abiodun testified those involved in the attacks were landowners “motivated by the church being situated on land which the owners of the community believe did not belong to it,” which was not mentioned in the BOC narrative. The RAD also noted Ms. Abiodun’s oral evidence did not mention the vandalism or insults and attacks on church members that were set out in the BOC narrative. The RAD found the omission from the BOC narrative of a “major characteristic of the agents of harm, namely that they claimed to own the land on which the church stood,” combined with the omission from testimony of the attacks and destruction, weighed against the Abioduns’ credibility.

[16] The RAD went on to consider other aspects of the evidence. It found that since the attacks were alleged to have started in 2010, nearly seven years before the Abioduns fled, they did not have a subjective fear of persecution related to events at the church. The RAD concluded that on a balance of probabilities, the Abioduns had provided “insufficient credible evidence” to establish the events at the church occurred as described or that they amounted to a serious possibility of persecution.

(4) The RAD's decision is not fair or reasonable

[17] In my view, the RAD's conclusion that it did not need to put the asserted inconsistencies to the Abioduns cannot stand, as it is based on statements that do not accord with a reasonable assessment of the record.

[18] The Abioduns argue (a) the RAD did not consider the first three factors described in *Ngongo*; (b) the asserted contradictions were not obvious; and (c) they were not actual contradictions and even on the RAD's assessment were only omissions. With respect to the first argument, the factors identified in *Ngongo* are not intended to be either exhaustive or a requisite checklist that must each be addressed in every situation. A failure to speak to each *Ngongo* factor separately does not automatically render a decision unfair or unreasonable. In any event, the RAD clearly did consider the first factor, stating that the contradiction was "readily apparent." It also appeared to conclude that there was a contradiction between the reasons for the harassment and violence set out in the BOC narrative and the reasons given in Ms. Abiodun's testimony in response to the RPD's questions, rather than it being merely a "slip."

[19] Nevertheless, I agree with the Abioduns' second and third arguments that it was unreasonable for the RAD to conclude that there were "readily apparent" inconsistencies. Indeed, on a review of the testimony, it is difficult to see an inconsistency at all, let alone a readily apparent one. In undertaking this review, I take seriously the Supreme Court's injunction in *Vavilov* that the Court is to refrain from reweighing and reassessing evidence: *Vavilov* at para 125. At the same time, however, a reasonable decision must take the evidentiary record into

account and reasonableness may be jeopardized where the decision maker has “fundamentally misapprehended or failed to account for the evidence before it”: *Vavilov* at para 126. Examining the RAD’s finding of fact that there was a readily apparent contradiction in the evidence on the deferential reasonableness standard, I conclude the finding was unreasonable. This finding was central to both the RAD’s conclusion that fairness did not require the asserted contradiction to be put to the Abioduns and its rejection of this aspect of the claim on the merits.

[20] As noted, the inconsistencies the RAD identified were (a) the BOC narrative did not mention a “major characteristic” of the agents of harm referred to in Ms. Abiodun’s testimony, namely that they claimed to own the land the church was on and that this motivated the attacks; and (b) the oral testimony did not refer to the incidents of attacks on church members, destruction of their property, and actions taken to defile the church.

[21] However, Ms. Abiodun did not testify that the agents of harm claimed to own the land on which the church stood, or that who owned the land was a material motivation of the agents of harm. The four minutes of the hearing addressing the allegations of religious persecution consisted of the following exchange, which began just after the RPD said it was referring to the BOC narrative:

MEMBER: So your father was a pastor, is that correct?

MS. DORCAS ABIODUN: Yes, he is.

MEMBER: And so and what about your mother, what was her involvement in the church?

MS. DORCAS ABIODUN: My mother also was a pastor and was the GO’s wife, the General Overseer’s wife.

[Clarification of term General Overseer.]

MEMBER: And so why was the church destroyed? Or I guess parts of the church were destroyed?

MS. DORCAS ABIODUN: Yes, so, in 2010, we moved to a new house which was...the address at the back of the church so we had the church in front and the house at the back. There was just a small gate in between. So afterwards when we started worshipping in that venue, as the church, there was different issues coming up, people coming to church to disrupt and interrupt the service stating that the church is not supposed to be there because they are not going to allow it.

MEMBER: So who...

MS. DORCAS ABIODUN: For the church to be...

MEMBER: Who were these people?

MS. DORCAS ABIODUN: Ok they call them the omonile [ph] in...if the interpreter can help me...they call them...

INTERPRETER: Like the umm... landowner.

MEMBER: Okay.

INTERPRETER: The landowner.

MS. DORCAS ABIODUN: Yeah. Which also they were a member of a political party called PDP most of them.

[Clarification of political party name.]

MEMBER: So why did they not want the church there?

MS. DORCAS ABIODUN: First of all they did not want the church there because they were not, they did not believe in God, they believed in something else differently, I do not know what it is. And the second thing is that because they know our parents' political status with APC so that was another major problem.

MEMBER: Ok, so your parents are a part of a different political party?

MS. DORCAS ABIODUN: Exactly, yes.

[Clarification of political party name.]

MEMBER: So what do you know about your parents' involvement with that party?

MS. DORCAS ABIODUN: My parents are the board members, the governing board members of Glazden [ph]. And also my mum, also my mum, she is the one that is in charge of the electoral committee.

MEMBER: And so what was it about this party or their involvement that had these landowners upset?

MS. DORCAS ABIODUN: Usually they were already upset because of the church that was placed in their place, in their area, their...

INTERPRETER: “Community.”

MS. DORCAS ABIODUN: ...their community, yes. So, and then coupled with the fact that they realize “Oh, these people are APC” so they didn’t want it to work at all. So it was the combination of both.

[Emphasis added; my transcription; non-substantive confirmations of evidence omitted.]

[22] Ms. Abiodun’s evidence was that the landowners did not want a church in the community because they did not believe in God, and because of her parents’ political affiliation. At no point did she assert the landowners were asserting a property claim or that the issue was ownership of the land. This testimony is consistent with the BOC narrative, which stated “[w]e later realized that it is an environment that is filled with unbelievers. Because of this, we have had various problems as they insisted that they don’t want a church in the area.”

[23] Nor is there any basis to find a readily apparent contradiction based on the “omission” from the oral testimony of incidents of attacks or vandalism. As seen above, after mentioning the BOC narrative the RPD member asked not *what* happened, but *why* the church was destroyed, a question that assumes the existence of the attacks and focuses on their motivation. As the Minister fairly conceded during argument, it is not reasonable to question a claimant’s credibility

because she did not respond to the question “*why* did this happen?” with a description of *what* happened.

[24] The RAD’s finding that it did not need to put these questions to the Abioduns was based on an unreasonable conclusion that there were “readily apparent” inconsistencies between the testimonial evidence and the BOC narrative. Whether this is considered a matter of procedure or as a fundamental misapprehension of the evidence, I find it was unfair and unreasonable for the RAD to conclude it could make adverse credibility conclusions based on these asserted inconsistencies in the testimony without putting the purported inconsistencies to Ms. Abiodun.

[25] I find the RAD’s decision as a whole cannot stand in light of the RAD’s errors on this issue. The RAD referred to other matters, including the Abioduns’ delay in fleeing Nigeria and a lack of police reports. However, read in context, I cannot find that the RAD’s conclusion on subjective fear was based solely and independently on their delay in fleeing. Rather, the RAD’s finding that “the Appellants have provided insufficient credible evidence to establish that events connected to the church occurred as described or that they amount to a serious possibility of persecution” was materially connected to its unreasonable credibility finding based on the asserted inconsistencies.

[26] In the circumstances, I conclude the error was not “merely superficial or peripheral to the merits of the decision,” but rather was “sufficiently central or significant to render the decision unreasonable”: *Vavilov* at para 100. Viewed through the fairness lens, I cannot say the unfairness in not putting what was unreasonably identified as “readily apparent” inconsistencies to the

Abioduns was one that had no impact on the outcome: *Pavicevic v Canada (Attorney General)*, 2013 FC 997 at paras 55–56; *Nagulathas v Canada (Citizenship and Immigration)*, 2012 FC 1159 at para 24; *Khosa* at para 43.

[27] The application for judicial review will therefore be allowed on this basis.

B. *The RAD's conclusion on the allegation of persecution from voodoo was reasonable*

[28] The Abioduns also claimed they faced persecution arising from threatened female genital mutilation. In Ms. Abiodun's oral testimony about these claims, she raised the issue of voodoo being used as a form of persecution. The RPD in its reasons said it did not find "that voodoo and charms present an actual physical risk to the claimants' safety." The RAD similarly found that "[w]hile they may fear that voodoo will be applied to harm their parents, I also find there is no evidence before me that voodoo is effective, and will result in persecution of the Appellants."

[29] The Abioduns challenge the RAD's statement that there is no evidence voodoo is effective and would result in persecution. They argue the RAD failed to apply the appropriate subjective and objective test for persecution: *Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593 at para 119. While the RAD accepted the Abioduns had a subjective fear of persecution from voodoo, they argue the RAD failed to consider the objective evidence of ritual voodoo practices in the National Documentation Package for Nigeria.

[30] The parties agree this issue goes to the merits and is reviewable on the reasonableness standard: *Vavilov* at paras 23-25. In reasonableness review, the reasons of a decision maker are

to be read in light of the history and context of the proceedings, including the evidence and submissions of the parties: *Vavilov* at para 94.

[31] On this issue, the evidentiary context is again determinative. Contrary to the Abioduns' argument, their stated fear was not that they would face physical violence from rituals performed by those practising voodoo in Nigeria. Rather, Ms. Abiodun's stated fear of voodoo came up in two passages in her testimony. First, in response to a question asking how the agents of persecution could still punish her parents if nobody knows where they are, Ms. Abiodun responded "they have charms, they have voodoo, they have different things, they are very powerful, they have like different things they could use to hurt people without physically seeing them." Second, the RPD asked about five minutes later whether Ms. Abiodun believed the agents of persecution could actually harm her without physically seeing her, to which she replied "yes, they have voodoo, they can."

[32] This evidentiary context makes clear the RAD's conclusion on the issue of voodoo was simply that there is no evidence the agents of persecution could harm the applicants or their parents without physically seeing them, through the use of charms or voodoo. As counsel for the Abioduns fairly conceded in argument, this context makes the RAD's statement on this issue a reasonable one.

IV. Conclusion

[33] As the RAD's conclusions on the Abioduns' credibility regarding their allegations of religious persecution were unfair and based on an unreasonable assessment of the evidence, the decision is set aside and the appeal is remitted to the RAD for redetermination.

[34] Neither party proposed a question for certification, and I agree that none arises.

JUDGMENT IN IMM-1633-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed and the applicants' appeal is returned to the RAD for redetermination by a differently constituted panel.

“Nicholas McHaffie”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1633-20

STYLE OF CAUSE: DORCAS OLUWATOM ABIODUN ET AL v
MINISTER OF CITIZENSHIP AND IMMIGRATION

**HEARING HELD BY VIDEOCONFERENCE ON APRIL 26, 2021 FROM OTTAWA,
ONTARIO (COURT) AND MONTREAL AND WESTMOUNT, QUEBEC (PARTIES)**

JUDGMENT AND REASONS: MCHAFFIE J.

DATED: JUNE 22, 2021

APPEARANCES:

Mark J. Gruszczynski FOR THE APPLICANTS

Simone Truong FOR THE RESPONDENT

SOLICITORS OF RECORD:

Canada Immigration Team FOR THE APPLICANTS
Westmount, Quebec

Attorney General of Canada FOR THE RESPONDENT
Montreal, Quebec