

Federal Court



Cour fédérale

Date: 20221123

Docket: IMM-2468-21

Citation: 2022 FC 1607

Ottawa, Ontario, November 23, 2022

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

**CHANTELLE ALICIA BROWN
SEFTON KIRK-DALE BROWN
CRISTIAN DALE-ANTHONY BROWN**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants are Chantelle Alici Brown (“Ms. Brown”), her husband, and their minor child. Ms. Brown’s father was a senior officer of the Jamaican police. In February 2004, he was murdered. His murder remains unsolved. Following the death of Ms. Brown’s father, Ms. Brown and her family received anonymous threats calling on the family to stop their investigations into

his murder. Ms. Brown and her husband went to the United States, where the minor Applicant was born in 2009. Ms. Brown alleges that she continued her investigations into her father's unresolved murder while in the United States and continued to receive threatening phone calls.

[2] After approximately 15 years in the United States, the Applicants came to Canada in June 2019 and made a claim for refugee protection. The Refugee Protection Division [RPD] dismissed their refugee claims in February 2020. The Applicants appealed this determination to the Refugee Appeal Division [RAD]. Part of their argument on appeal was that the RPD breached procedural fairness by drawing a negative credibility inference from Ms. Brown's inability to provide details of her continued investigations into her father's murder. The Applicants argue that the RPD never asked Ms. Brown to provide these details, nor to explain the reason for her lack of corroborative evidence in support of her investigations. The Applicants say that had the RPD asked Ms. Brown, she would have provided these details as she has done in the affidavit she filed on appeal.

[3] I find the RPD's breach of procedural fairness determinative. Ms. Brown's inability to describe her ongoing investigations into her father's death was a key basis to discount her credibility and to find she had not established ongoing risk. Given the centrality of this finding, it is a sufficient basis for setting aside the RAD's decision. As such, it is unnecessary to address the other grounds the RAD relied upon to dismiss Ms. Brown's appeal, many of which the Applicants challenge on judicial review.

[4] Based on the reasons below, I grant the judicial review.

II. Issues and Standard of Review

[5] As I have noted above, the determinative issue on this judicial review relates to the RPD's alleged breach of procedural fairness by impugning Ms. Brown's credibility in relation to her investigation efforts despite the narrow examination of this issue at the refugee hearing.

[6] Both parties argued that the presumption of reasonableness does not apply to this issue as it deals with procedural fairness. As I recently noted in *Al Hommos v Canada (Minister of Citizenship and Immigration)*, 2022 FC 1294 at para 12 [*Al Hommos*], this Court has taken different approaches where the alleged breach of fairness relates to the RPD's procedure and the RAD has considered the alleged breach in its reasons, as is the case here. In *Al Hommos*, unlike here, both parties argued that I should apply the reasonableness standard to the procedural fairness issue. This Court has found in a number of cases that the RAD's reasons related to the breach of fairness ought to be evaluated on the reasonableness standard (see for example: *Ahmad v Canada (Minister of Citizenship and Immigration)*, 2021 FC 214 at para 13; *Omirigbe v Canada (Minister of Citizenship and Immigration)*, 2021 FC 787 at para 25). There are other decisions where the Court did not apply a reasonableness standard (see for example: *Ambroise v Canada (Minister of Citizenship and Immigration)*, 2021 FC 62 at paras 8-10; *Vardalia v Canada (Minister of Citizenship and Immigration)*, 2022 FC 300 at para 20).

[7] Like in *Al Hommos*, given that neither party made extensive submissions addressing this point and that my determination does not turn on the standard of review, I need not decide this issue. As I explain below, I am satisfied that the hearing procedure at the RPD, which produced

the record that the RAD considered, was not fair in all the circumstances (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54). I am also satisfied that the RAD's consideration of this issue on appeal was unreasonable.

III. Analysis

[8] The Applicants' procedural fairness argument on appeal relies on comparing the RPD's finding about Ms. Brown's investigation into her father's death and the RPD's examination of this issue at the hearing. The Applicants' position is that it is unfair for the RPD to impugn Ms. Brown's credibility based on its narrow examination.

[9] There is no dispute between the parties that the only relevant section in the transcript of the RPD hearing is the following exchange:

PRINCIPAL CLAIMANT: He's the Labour Party. One of the reasons why because there's has been no resolution in the case and so I keep on trying to get answers for that because it's really hard that something can happen like that, and because I keep on pressing the issue of finding a solution to something, they're going after me to stop investigating or stop questioning or stop going in detail to try to figure out what happened because I mean, it's really for me to not have an answer.

MEMBER: Yeah, I mean, are you still actively trying to figure things out?

PRINCIPAL CLAIMANT: I'm trying to find out what happened.

MEMBER: (Crosstalk) what is happening in the police, in the JCF [Jamaica Constabulary Force]?

PRINCIPAL CLAIMANT: Yes, ma'am. I know people in it.

MEMBER: So what do they think about you going back?

PRINCIPAL CLAIMANT: In terms of, we – what do you mean what they think, if I am just –

MEMBER: (Crosstalk) going back to Jamaica.

PRINCIPAL CLAIMANT: They will tell me don't come because you don't know what will happen. You don't know who is who or who can be trusted.

MEMBER: And you have any notes and things like this that you keep? Or how are you --?

PRINCIPAL CLAIMANT: How am I --?

MEMBER: Pardon me.

PRINCIPAL CLAIMANT: Repeat that please.

MEMBER: Well, do you have any notes? Like, are you keeping a file on this – on this to your investigations or anything like this?

PRINCIPAL CLAIMANT: Everything that I have, like I gave it to my lawyer in terms of what I have documented or kept.

MEMBER: So then you spent a couple of – you tried a couple of angles coming to Canada on your immigration programs here?

[10] The RPD did not accept Ms. Brown's evidence that she continued her investigations after leaving Jamaica and made the following findings regarding Ms. Brown's overall credibility in relation to her allegedly continuous investigation into her father's murder:

The claimant was asked about the nature of her investigations into her father's death after fleeing Jamaica for the United States in 2004. The claimant was unable to provide any specifics about the type of investigations that she claimed to have undertaken over the years since 2004 – for example, no names of persons she contacted and no corroborative notes, emails or letters of any sort that the panel believes could have been reasonably available, given the importance of such information to establishing her claim.

....

The panel draws a negative inference as [to] the claimant's overall credibility because of the failure of the claimant to provide any persuasive specifics about her ongoing investigation efforts and alleged threats she received. The panel finds that the claimant has not continued investigations into her father's death since leaving Jamaica, as alleged.

[11] The Applicants take issue with the RPD's statement that Ms. Brown "was asked about the nature of her investigation into her father's death after fleeing Jamaica" and that she "was

unable to provide any specifics about the type of investigations that she claimed to have undertaken over the years.” They argue that it is evident from the transcript that the RPD did not ask Ms. Brown these sorts of questions and therefore it is unfair to impugn her credibility based on her inability to answer questions not posed to her.

[12] Neither the RAD, nor the Respondent on judicial review, dispute that the RPD did not ask Ms. Brown specific questions requesting that she elaborate on the nature of her investigations; nor does the RAD or the Respondent argue that the RPD asked for an explanation for the lack of corroborative evidence of the investigation efforts. Their position is that it was unnecessary for the RPD to do so.

[13] The RAD begins with the premise that the details of Ms. Brown’s investigation efforts were key to establishing her risk and therefore should have been included in her refugee narrative as part of her Basis of Claim form [BOC]. And further, if not included there, Ms. Brown’s counsel should have elicited this specific information during his examination at the hearing or made submissions on it or attempted to file post-hearing submissions or evidence.

[14] I do not agree. First, on the issue of what must be included in the BOC, this Court has repeatedly found that an “omission should not be used to impugn [a claimant’s] credibility unless it was material and significant to the claim” (*Nwabueze v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1577 at para 11; *Aliserro v Canada (Minister of Citizenship and Immigration)*, 2022 FC 412 at para 26; *Feradov v Canada (Minister of Citizenship and Immigration)*, 2007 FC 101 at paras 18-19 [*Feradov*]).

[15] The RAD relies on the statement in the BOC instructions which the RAD notes are written in bold print: “**INCLUDE EVERYTHING THAT IS IMPORTANT FOR YOUR CLAIM.**” The problem is there are different views on materiality. As Justice Barnes aptly observed in *Feradov*, a decision cited by both parties and the RAD on this issue: “It is well understood that these documents [refugee claim forms] are often prepared by representatives or on the advice of representatives with different views of materiality” (*Feradov* at para 18). Like the claimant in the *Feradov* decision, Ms. Brown’s BOC narrative “was clearly not intended to be an encyclopaedic recitation of the evidence. To the contrary, it was obviously written as a very general summary of the central aspects of [the] claim” (*Feradov* at para 19).

[16] The RAD’s concern is not that Ms. Brown provided inconsistent evidence or even that she omitted the central allegation that she continued her investigation into her father’s murder. It is that she failed to include details about how she conducted her investigation – whom she contacted and when – in her BOC. These are collateral details and not central aspects of the claim.

[17] The RAD finds: “The Appellants’ omissions in this regard reflect a failure to mention material allegations of persecution or harm and not merely peripheral or insignificant details.” It is inaccurate to find, as the RAD has done, that the details of Ms. Brown’s investigations are “material allegations of persecution.” They are not. I agree that from the perspective of the RPD or the RAD details about Ms. Brown’s investigation efforts were not “insignificant details.” These details could be relevant for the RPD and the RAD in evaluating Ms. Brown’s ongoing risk. However, it is a leap to say that because this is information the decision-maker would like

to know in order to make their decision, its absence from the BOC is grounds for drawing a negative credibility inference against a claimant. The details of Ms. Brown's investigation efforts are ancillary to her central claim. Some decision-makers may want to hear more about details and others may not. As Justice Barnes found in *Feradov*, "the absence of collateral detail ought not to have concerned the Board."

[18] Second, the RAD also finds no breach of procedural fairness because Ms. Brown's counsel could have elicited details of the investigation from Ms. Brown during counsel's examination at the RPD hearing. The RAD's finding has to be considered in light of the procedure at refugee hearings, where the Board asks the claimant questions first and counsel questions the claimant afterwards (so-called reverse-order questioning). As Justice de Montigny noted in *Sarker v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1168 at paragraph 19 [*Sarker*], in refugee hearings conducted by way of reverse-order questioning, "the person with the onus is no longer in control of the process and there is an increased burden on the Board to ensure that issues which are determinative of the claim are raised at the hearing."

[19] The issue is one of fairness. As Justice Pelletier observed in *Veres v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16449 (FC), [2001] 2 FC 124 at paragraph 29, the question to ask is: "Would the interaction which occurred fairly put the claimant on notice that the absence of further explanation would be prejudicial to his/her cause?"

[20] Here, the RPD did not state at the outset of the hearing nor prior to hearing counsel's submissions that it was concerned by the lack of evidence about the investigation. A review of

the brief exchange at the hearing on this issue also does not suggest that the RPD was concerned about this lack of evidence. The RPD did not ask for details about the specifics of the investigation, nor for an explanation for the lack of corroborative evidence. In these circumstances, counsel could not have been expected to proactively elicit those specifics because it was not at all clear that there was any concern with Ms. Brown's evidence on this issue.

[21] The RPD itself seemed to have understood that the lack of specificity and corroborative evidence of the investigation needed to be canvassed with the claimant prior to making a negative finding about her credibility. The RPD stated that it had asked the claimant about the nature of her investigations. Though the RAD frames it differently, the heart of the Applicants' appeal is really that the RPD said it asked the claimant for details but in fact it did not.

[22] Further, though the RPD asked whether Ms. Brown had any corroborative evidence (notes or recordings) of her investigations, it did not ask her to explain why such evidence was not available. The RPD was required to give Ms. Brown an opportunity to explain the lack of corroborative evidence (see discussion in *Senadheerage v Canada (Minister of Citizenship and Immigration)*, 2020 FC 968 at paras 23-40).

[23] The Respondent argues that even if the RPD breached procedural fairness, given the other findings by the RAD impugning the Applicants' credibility, the breach is not determinative of the claim and therefore should not be a basis to set aside the decision. The key issue for the RPD and the RAD was whether the Applicants face an ongoing risk in Jamaica. The RPD did not accept that Ms. Brown had continued her investigations into her father's murder after she left

Jamaica. This was a significant finding in relation to her ongoing risk. This finding served as one of the two grounds relied on by the RPD to draw a negative inference as to Ms. Brown's overall credibility. The RAD found that the RPD's credibility assessment was correct. In these circumstances, I cannot confidently conclude that the breach of procedural fairness has no impact on the decision (*Sarker* at paras 16-17; *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, 1994 CanLII 114 (SCC)). Accordingly, the matter has to be sent back to be redetermined.

[24] Neither party raised a question for certification and I agree that none arises.

JUDGMENT IN IMM-2468-21

THIS COURT'S JUDGMENT is that:

1. The judicial review is allowed;
2. The decision of the RAD dated March 23, 2021 is set aside;
3. The matter is sent back to be redetermined by a different member of the RAD; and
4. No serious question of general importance is certified.

"Lobat Sadrehashemi"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2468-21

STYLE OF CAUSE: CHANTELLE ALICIA BROWN ET AL V THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: APRIL 5, 2022

JUDGMENT AND REASONS: SADREHASHEMI J.

DATED: NOVEMBER 23, 2022

APPEARANCES:

Rebeka Lauks FOR THE APPLICANTS

Amy King FOR THE RESPONDENT

SOLICITORS OF RECORD:

Battista Smith Migration Law Group FOR THE APPLICANTS
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario