Federal Court  Cour fédérale

Date: 20230329

Docket: IMM-1225-22

Citation: 2023 FC 437

Toronto, Ontario, March 29, 2023

PRESENT: Madam Justice Go

BETWEEN:

Charity NMASHIE
Gerald Nii Klu NMASHIE (a Minor)
Eliana Naa Adjeley NMASHIE (a Minor)
Joel Nii Adjetey NMASHIE (a Minor)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. Charity Nmashie [the "Principal Applicant", or "PA"] and her three children [together, the "Applicants"], are citizens of Ghana. They arrived in Canada in 2017 and filed a

claim for refugee protection in 2019 on the basis that they fear persecution from the PA's mother's family, who believe the PA and her mother are witches.

[2] The Refugee Protection Division [RPD] rejected the Applicants' claim in September 2021 on credibility grounds.

[3] On appeal, the Refugee Appeal Division [RAD] agreed that the RPD erred in making its negative credibility findings, and accepted most of the PA's allegations in her Basis of Claim [BOC] narrative and testimony as generally credible and consistent. However, the RAD concluded that the PA provided insufficient evidence that the Applicants have been physically harmed by their agents of persecution, or that they face a serious possibility or likelihood of physical harm in the future.

[4] Thus, in a decision dated January 17, 2022, the RAD rejected the Applicants' appeal of the RPD decision and confirmed that they are neither Convention refugees nor persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] [Decision].

[5] The Applicants seek judicial review of the Decision.

[6] I grant the application as I find that the RAD breached its duty of procedural fairness by rejecting the Applicants' claim based on a new issue without first providing the Applicants an opportunity to make submissions.

II. Issues and Standard of Review

[7] The Applicants raise the following issues in this application:

a. Whether the RAD breached the Applicants' right to procedural fairness by considering a new issue; and

b. Whether the Decision is unreasonable because the RAD imposed a higher burden than what is required on the Applicants.

[8] The parties do not make specific submissions as to the standard of review for issues of procedural fairness. It is well-accepted that issues of procedural fairness raised in judicial reviews of RAD decisions are reviewable on a correctness standard: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*CPR*] at para 34; *Mission Institute v Khela*, 2014 SCC 24 at para 79. The ultimate question is whether the procedure was fair having regard to all of the circumstances, including the factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*]; *CPR* at para 54; see also *Perez v Canada (Citizenship and Immigration)*, 2020 FC 1171 at paras 6-7.

[9] The parties agree that the merits of the Decision are reviewable on a reasonableness standard, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

III. Analysis

[10] In my view, the determinative issue in this case is the breach of procedural fairness.

[11] The Applicants argue that the RAD breached its duty of procedural fairness by finding new concerns upon which to reject the Applicants' claim, without notifying the Applicants about these concerns and granting them an opportunity to respond.

[12] Specifically, the Applicants submit that the RAD raised a new issue when it found insufficient evidence to establish that the Applicants would face a level of harm upon return to Ghana that would satisfy their refugee claim. The Applicants highlight the Federal Court of Appeal's decision in *Huruglica v Canada (Citizenship and Immigration)*, 2016 FCA 93, which confirmed that the RAD should use a correctness standard when reviewing RPD decisions, and cautioned that appeals to the RAD are not a true de novo proceeding: at paras 78-79. Recalling that the sole determinative issue for the RPD was credibility, the Applicants note that their appeal to the RAD focused exclusively on the negative credibility findings of the RPD.

[13] The Applicants assert that the RAD did not have jurisdiction to consider the new issue of serious risk of persecution on the basis of insufficient evidence. The Applicants rely on the Court's statement in *Ojarikre v Canada (Citizenship and Immigration)*, 2015 FC 896 [*Ojarikre*] that the RAD "does not possess the jurisdiction to consider an issue that, although fully canvassed before the RPD, was not relied upon in its decision and therefore was not the subject matter of the Applicant's appeal": at para 20.

[14] The Applicants also rely on *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 [*Kwakwa*] and *Ching v Canada (Minister of Citizenship and Immigration)*, 2015 FC 725 [*Ching*] for the proposition that a new issue is raised where the RAD goes beyond the

determinative issue in the RPD decision under appeal, and that applicants must be given an opportunity to respond where a new issue is raised: see *Kwakwa* at paras 25-27.

[15] Therefore, the Applicants argue that the RAD's failure to provide an opportunity to respond to new issues and consequent breach of procedural fairness renders the Decision as a whole invalid: *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at 660.

[16] The Respondent denies that the RAD breached its duty of procedural fairness by introducing a new issue in the Decision. The Respondent maintains that the alleged risk to the Applicants' lives is not a new issue, as it was canvassed at the RPD hearing and formed part of the RPD and RAD records. The Respondent points out the Applicants' BOC narrative and the written submissions made to the RAD to support their claim that they are targeted and at risk.

[17] The Respondent asserts that the Applicants' submissions to the RAD asking it to find their allegations credible amounted to asking the RAD to find that these allegations support a finding of risk and persecution. Contrary to the Applicants' assertions, the Respondent maintains that the RAD did not make "additional findings or analyses on issues unknown to the applicant": *Lopez Santos v Canada (Citizenship and Immigration)*, 2021 FC 1281 at para 45, citing *Kwakwa* at paras 24-25.

[18] As both parties cite para 25 of *Kwakwa* to support their positions, I begin my analysis with this paragraph:

> [25] In *Ching v Canada (Minister of Citizenship and Immigration)*, 2015 FC 725, the Court concluded that, when a new

> question and a new argument have been raised by the RAD in support of its decision, the opportunity must be given to the applicant to respond to them. In that case, the RAD had considered credibility conclusions which had not been raised by the applicant on appeal of the RPD decision. This amounted to a "new question" on which the RAD had the obligation to advise the parties and offer them the opportunity to make observations and provide submissions. Similarly, in *Ojarikre v Canada (Minister of Citizenship and Immigration)*, 2015 FC 896 at para 20 and *Jianzhu v Canada (Minister of Citizenship and Immigration)*, 2015 FC 551 at para 12, the RAD had raised in its decision questions which had not been reviewed or relied on by the RPD or advanced by the applicant. These situations can be distinguished from *Sary v Canada (Citizenship and Immigration)*, 2016 FC 178 at para 31, in which I found that the RAD did not examine any "new questions" but rather referred to evidence in the record which supported the conclusions reached by the RPD. **A "new question" is a question which constitutes a new ground or reasoning on which a decision-maker relies, other than the grounds of appeal raised by the applicant, to support the valid or erroneous nature of the decision appealed from.**
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> [Emphasis added]

[19] In *Ching*, Justice Kane relied on a similar definition of a "new issue" in her analysis:

> [66] In *R v Mian*, 2014 SCC 54, [2014] 2 SCR 689 [*Mian*], the Supreme Court of Canada addressed the scope of an appellate court's jurisdiction to raise new issues, what constitutes a new issue, when such jurisdiction should be exercised and the procedures to be followed. Although *Mian* was a criminal case, the principles have been applied in other proceedings, including the administrative context.
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> [67] The Court defined a "new issue" at para 30:
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> > An issue is new when it raises a new basis for potentially finding error in the decision under appeal beyond the grounds of appeal as framed by the parties. Genuinely new issues are legally and factually distinct from the grounds of appeal raised by the parties (see *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712, at para. 39) and cannot reasonably be said to stem from the issues as framed by the parties. It follows from this definition that a new issue will require notifying the parties in advance

> so that they are able to address it adequately. [Emphasis added]
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> [68] The Court concluded at para 41, that although an appellate court has jurisdiction to raise a new issue, this would be rare and only "when failing to do so would risk an injustice. The court should also consider whether there is a sufficient record on which to raise the issue and whether raising the issue would result in procedural prejudice to any party."
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> [69] The Court elaborated on the considerations regarding the discretion of appellate courts to raise new issues, including: the jurisdiction of the court to consider the issue; whether there is a sufficient basis in the record on which to resolve the issue; and, whether there would be any procedural prejudice to either party (i.e. whether the parties will have the opportunity to respond) (at paras 50-52).
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> [70] The Court noted that when the appellate court raises a new issue, generally, the parties must be notified and given the opportunity to respond to the new issue.
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> [71] In my view, these principles should apply beyond the context of criminal appeals and, with the necessary modifications, to the context of appeals before the RAD. The RAD should first consider if the issue is "new" and if failing to raise the new issue would risk injustice. If the RAD pursues the new issue, it seems clear that procedural fairness requires that the party or parties affected be given notice and an opportunity to make submissions.

[20] The case of *R v Mian*, 2014 SCC 54, [2014] 2 SCR 689 [*Mian*] cited in *Ching* thus stands for the general proposition that where an appellate court raises a new issue, parties must be notified and given the opportunity to respond. However, the strict application of this concept to the RPD/RAD context is not binding, as the Court affirms in *Ching* by stating "[w]hether or not the principles in Mian should be applied by the RAD, it is a basic principle of natural justice and procedural fairness that a party should have an opportunity to respond to new issues and concerns that will have a bearing on a decision affecting them": at para 74.

[21] In the Decision, the RAD rejected the Applicants' claim based on insufficient evidence of physical abuse by the agents of harm to establish a serious possibility or a likelihood of harm under section 96 of *IRPA*. It also found that the forward-facing psychological harms alleged do not rise to the level of persecution or section 97 harm.

[22] Drawing on the basic principles of natural justice and procedural fairness, I agree with the Applicants that the RAD raised a new issue and should have given the Applicants an opportunity to respond to its concerns when it denied their claim. I say this for the following four reasons.

[23] First, I agree that the issue of serious possibility or likelihood of physical harm is a new issue in that "it is a question which constitutes a new ground or reasoning on which a decision-maker relies, other than the grounds of appeal raised by the applicant, to support the valid or erroneous nature of the decision appealed from": *Kwakwa* at para 25.

[24] As noted above, the RPD rejected the Applicants' claim on the sole basis of credibility. On appeal, the Applicants' submissions focused on the reasonableness of the RPD's credibility findings and the RPD's rejection of the corroborative documentary evidence submitted by the Applicants in support of their claim. The Applicants also raised the issue of reasonable apprehension of bias. While the RAD found insufficient evidence to conclude that the RPD was biased, overall, the RAD found the PA to be a credible witness, and accepted the Applicants' evidence.

[25] In concluding that the Applicants are neither Convention refugees nor persons in need of protection, the grounds relied upon by the RAD for the Decision did not fall within any of the grounds of appeal raised by the Applicants. Rather, I find that the grounds relied upon were "legally and factually distinct from the grounds of appeal raised by the parties": *Ching* at para 67, citing *Mian* at para 30. This distinction is especially pertinent given that the RAD's conclusion was based in part on its finding that there was "insufficient evidence of physical abuse by the agents of harm." The Applicants submit before this Court that the RAD's focus on physical harm – as opposed to psychological – imported an "unreasonable yardstick" that elevated the burden they have to meet. While I need not address this aspect of the Applicants' submissions, I highlight this argument to underscore that the RAD made a legal finding distinct from both the reasoning of the RPD decision and the grounds of appeal relied on by the Applicants.

[26] While I acknowledge that the issues of alleged risk and persecution formed part of the evidentiary record before the RPD and RAD, I reject the Respondent's argument that by asking the RAD to find their allegations credible, the Applicants were effectively asking the RAD to find that their allegations support a finding of risk and persecution. I am not convinced it can be said that the Applicants could have contemplated that the RAD would rely specifically on the non-physical nature of the harm they have allegedly experienced to reject their claim.

[27] Second, the Respondent cites *Tan v Canada (Citizenship and Immigration)*, 2016 FC 876 [*Tan*], where the Court reiterated the role and limits of the RAD in reviewing an appeal from the RPD: at para 40. Based on the Court's statement in *Tan*, the Respondent notes that the issue of

alleged risk and persecution is not a new issue as it was part of the record before the RPD and RAD. My reading of *Tan* does not support the Respondent's position.

[28] In *Tan*, Justice Strickland took a deep dive into the jurisprudence by reviewing several decisions from this Court, and made some general observations as to what the RAD is permitted to do within its jurisdiction, at para 40:

> What I take from the above is that, in the context of a RAD appeal, where neither party raises or where the RPD makes no determination on an issue, it is generally not open to the RAD to raise and make a determination on the issue, as this raises a new ground of appeal not identified or anticipated by the parties thereby potentially breaching the duty of procedural fairness by depriving the affected party of an opportunity to respond. This is particularly so in the context of credibility findings (*Ching* at paras 65-76; *Jianzhu* at para 12; *Ojarike* at paras 14-23). However, with respect to findings of fact and mixed fact and law which raise no issue of credibility, the RAD is to carefully review the RPD's decision, applying the correctness standard, and then carry out its own analysis of the record to determine whether the RPD erred. If so, the RAD may substitute its own determination on the merits of the claim to provide a final determination (*Huruglica FCA* at para 103). That is, the RAD is to conduct a hybrid appeal. The RAD is not required to show deference to the RPD's findings of fact (*Huruglica FCA* at para 58). And, when addressing issues raised by the parties, the RAD is entitled to perform an independent assessment of the record before the RPD (*Sary* at para 29; *Haji* at paras 23 and 27; *Ibrahim* at para 26) and to refer to evidence that supports the findings or conclusions of the RPD (*Kwakwa* at para 30; *Sary* at para 31). In my view, the necessary corollary of this is that the RAD is also permitted to refer to evidence in the record before the RPD to explain why it believes the RPD erred with respect to an issue raised on appeal or why it does not agree with the RPD's findings of fact. Such reasons do not, in and of themselves, give rise to a new issue. The fact that the RAD views some of the evidence differently from the RPD is not a basis to challenge the RPD's decision on fairness grounds when no new issue has been raised (*Ibrahim* at para 30).

[29] In other words, Justice Strickland contemplated two main scenarios where no "new issue" is said to be raised:

> Scenario 1: If no issue of credibility is raised, then the RAD can carry out its own analysis of the record to determine whether RPD erred and may substitute its own determination on the merits.
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> Scenario 2: When addressing the issues raised by the parties, the RAD is entitled to perform an independent assessment of the record and refer to evidence that supports the findings or conclusions of the RPD. The RAD may view the evidence differently and that alone is not a basis to challenge the RPD's decision on fairness grounds when no new issue has been raised.

[30] Neither of the above scenarios, in my view, apply to the case at bar. Scenario 1 does not apply because the issue of credibility was raised, and was indeed the basis for the RPD decision and the Applicants' appeal. Scenario 2 also does not apply because the issue addressed by the RAD was not an issue raised by the Applicants, but an issue raised by RAD itself. As such, I am not convinced by the Respondent's submissions relying on *Tan*.

[31] Third, The Respondent asserts that the RAD had jurisdiction to consider the issue of prospective risk, as persecution and harm are the essence of a refugee claim: *Baez De La Cruz v Canada (Citizenship and Immigration)*, 2021 FC 457 [*Baez De La Cruz*] at para 10; *Musthaffa v Canada (Citizenship and Immigration)*, 2022 FC 59 [*Musthaffa*] at para 39; see also *Kwakwa* at para 25 and *Koffi v Canada (Citizenship and Immigration)*, 2016 FC 4 [*Koffi*] at para 38.

[32] However, as the Applicants submit, this Court has found the RAD's novel findings on an internal flight alternative [IFA], as in the case of *Ojarikre*, and the issue of a *sur place* claim, as

in *Jianzhu v Canada (Minister of Citizenship and Immigration)*, 2015 FC 551, to be new issues. While I acknowledge the Respondent's argument that the issue of prospective risk is the essence of a refugee claim, the same can be said about issues of identity, credibility, IFA, and state protection. I am unable to locate a decision from this Court, nor has the Respondent pointed me to one, where the Court determines that an issue can only be new where it is peripheral to the refugee claim, rather than being part of the essence of it.

[33] Indeed, an argument can be made that the more central the issue is to the determination of a refugee claim, the greater the requirement of procedural fairness rests on the RAD's part to raise its concerns with a claimant and to afford them an opportunity to respond. This requirement would be commensurate with the guidance from *Baker* that the nature and extent of the duty of fairness owed should correspond with the importance of the decision to the individual(s) affected: at para 25.

[34] Fourth and finally, I find the cases cited by the Respondent distinguishable on the facts. In *Baez De La Cruz*, the Court rejected the procedural fairness argument in part because the applicant did not challenge the multiple credibility findings made by the RPD and confirmed by the RAD, which reasonably supported the conclusion that there is no prospective risk: at para 9. In *Musthaffa*, the Court found that the applicant explicitly invited the RAD to consider the objective evidence in their submissions on appeal, upon which the RAD ultimately relied to reject their claim: at para 38. Lastly, in *Koffi*, the Court found that the applicant was well aware that the only issue before the RAD was his identity and his use of fraudulent documents to establish his identity. As such, it could not be said that he did not know the case he had to meet

or that he did not have an opportunity to respond to the credibility concerns in his submissions to the RAD: at para 39.

[35] In this case, neither the RPD nor the Applicants considered the issue of sufficiency of evidence of physical harm as the basis upon which the claim should be determined. The same can be said as to the issue of whether the psychological harm alleged rises to the level of persecution or section 97 harm. The RAD ought to have provided the Applicants an opportunity to comment on these specific issues, which were determinative of the Decision. The RAD's failure to do so amounted to a breach of procedural fairness.

IV. Conclusion

[36] The application for judicial review is allowed.

[37] There is no question to certify.

JUDGMENT in IMM-1225-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The decision under review is set aside and the matter referred back for redetermination by a different decision-maker.

3. There is no question to certify.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Kingsley I. Jesuorobo	FOR THE APPLICANT
Leanne Briscoe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Kingsley I. Jesuorobo Kingsley Jesuorobo & Associates North York, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT