Federal Court Cour fédérale

Date: 20201117

Docket: IMM-7563-19

Citation: 2020 FC 1063

[ENGLISH TRANSLATION]

Ottawa, Ontario, November 17, 2020

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

ABOUCHANAB DJARAMA BOUCHRA
DJIBRINE MAHAMAT DJARA
DJIBRINE MAHAMAT HANINE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of the Refugee Appeal Division [RAD], which declined to grant an appeal from the decision of the Refugee Protection Division [RPD]. The application for judicial review is brought pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

I. Facts

[2] The facts in this case are quite straightforward. Ms. Bouchra is a citizen of Chad. She made a refugee protection claim in Canada. She was accompanied by her two daughters, who are citizens of Great Britain.

[3] According to her Basis of Claim Form [BOC], she left her country on May 14, 2017, and claimed refugee protection in Canada seven days later. According to her account, she had worked for 10 years at the Embassy of the Kingdom of Saudi Arabia in Chad, where she was responsible for protocol and relations.

[4] She was also a member of the Coordination des associations de la société civile et de défense des droits de l'homme (CASCIDHO) since 2009, where she says she was principally involved in the defence of women's rights. Ms. Bouchra states that she was constantly threatened and that she feared for her life in her country of origin. In reality, there is little evidence of this.

[5] In her capacity as CASCIDHO coordinator in the 5th borough of the city of N'Djamena, she worked to mobilize and raise awareness among women. It appears that her focus was on early marriage and female genital mutilation of young girls.

[6] As such, on March 2, 2017, she showed a film on female genital mutilation at the local school. It appears that the film was rather graphic in that it actually depicted female genital mutilations taking place. According to her account, police officers intervened during this

screening to disperse the people attending it. Ms. Bouchra states that she was arrested and taken to the police station, where she was beaten, resulting in a nosebleed and pain from the blows. She was released the next day. Subsequently, in April 2017, she received a summons from the superior council for Islamic affairs to appear before it on June 28, 2017. This prompted Ms. Bouchra's husband to take action and obtain a visa for her and the children for the United States, effective April 21, 2017. She and her children left less than a month later.

II. Decisions before the Refugee Division

[7] The RPD's decision is short. The claim made on behalf of the applicant's two children was rejected at the outset given that as citizens of Great Britain, they had no claim against their country of citizenship.

[8] As for Ms. Bouchra's claim, the RPD found it to lack credibility. The RPD noted that there were two summonses from the superior council for Islamic affairs, with the second being a summons to appear that was sent more than a year after the applicant and her two daughters had left Chad. The RPD found these two summonses to be sham documents, given that they had no dates of issue, only dates for appearance. Both bear the same number, and neither mentions a reason for the summons. The RPD, claiming to have specialized knowledge of Chadian refugee claims, noted that neither summons included the word "Mrs.," which the RPD wrote was contrary to the norm in Chad. Upon examination of the two summonses, it is indeed peculiar that a form written in Arabic begins with "Mr. or Miss," without any reference to "Mrs." The RPD indicated that all three titles are normally seen on a summons. Ms. Bouchra could not explain the absence of [TRANSLATION] "the title Mrs.", which negatively affected her credibility.

[9] The RPD criticized the applicant for not seeking asylum in the United States, where she stayed for four days after leaving Chad. When questioned in this regard, the applicant's only response was that she wanted to come to Canada. Given that there is no reason to believe that the United States would not have honoured its international commitments, the RPD rejected this explanation, adding to the applicant's lack of credibility.

[10] The applicant appealed that decision to the RAD. Here again, only the applicant's situation was before the RAD, which means that the decision to reject the children's refugee claim is confirmed.

[11] In her memorandum before the RAD (Certified Tribunal Record (CTR), p 14), the applicant stated that the issue before the RPD was her credibility. She argued that [TRANSLATION] "credibility is the very basis of any claim for protection in Canada" and that the RPD erred in determining [TRANSLATION] "that the appellant was not credible on the basis of secondary and inconclusive elements" (p 17). The conclusion of the memorandum obviously dealt with the applicant's credibility.

[12] In addition, the applicant submitted that the RAD should hear appeals *de novo* and [TRANSLATION] "analyze the evidence before it and draw its own conclusions" (pp 15–16). Relying on *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93, [2016] 4 FCR 157 [*Huruglica*], the applicant argued that [TRANSLATION] "the Refugee Appeal Division is an appellate tribunal that must reassess the evidence in its entirety and intervene where the decision

is incorrect" (p 16). The applicant therefore invited the RAD to consider the evidence and come to its own conclusions.

[13] That is essentially what the RAD did:

> [13] After considering all the evidence and carrying out my own independent assessment of the evidence on the record, including listening to the recording, I conclude that the RPD's decision is correct, but for other reasons. Here is why.
>
> [Emphasis added.]

The RAD agreed with the RPD that while discrepancies and contradictions in the summonses might appear insignificant when considered individually, when considered as a whole, they could support a finding of a lack of credibility. The RAD stated at paragraph 17 of its decision that "[t]he multiple deficiencies in the summonses and the appellant's unsatisfactory explanations, for instance that the errors in the salutations on two occasions were made by them or that there is no evidence that the summonses should have been dated, discredit the documents' authenticity". The applicant testified that the superior council for Islamic affairs is a tribunal. The second summons from the council was issued more than a year after her departure from Chad. The RAD indicated that although the applicant worked and lived in the 5th borough, the summonses state that she is registered in the 3rd borough (RAD decision, para 18).

After listening to the recording of the RPD hearing, the RAD noted other elements that appeared to support its conclusion. For example, the film that was shown, and which was apparently the basis for the police intervention followed by the two summonses, was not illegal or prohibited. The applicant could not explain why the police would have arrested her in such circumstances. Nor did she explain her fear of the council of Islamic affairs, simply responding: "I do not know.

I am afraid of appearing before the council and being harassed, hit, etc." (RAD decision, para 21). The applicant also indicated upon questioning that CASCIDHO is authorized by the interior ministry. The RAD further noted the applicant's difficulty in providing details about the methods used to raise awareness, "other than meetings in kitchens in which she showed photographs. Her explanations in this regard were vague and repetitive" (RAD decision, para 22).

[14] This led the RAD to conclude that the applicant had not established a serious possibility of persecution in Chad. The appeal was therefore dismissed.

III. Standards of review

[15] The applicant raises two questions in her application for judicial review. First, she alleges a breach of a principle of natural justice, or procedural fairness. Second, she attacks the RAD's decision on the merits of her claim for refugee protection.

[16] The applicant did not address the applicable standards of review. This is most likely because the law is well established in this regard. Indeed, the standard of review on issues of procedural fairness is correctness (*Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502, at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at para 43). The decision in *Vavilov (Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]) changed nothing in this regard, which has been confirmed by this Court on numerous occasions since (*Shah v Canada (Citizenship and Immigration)*, 2020 FC 448; *Suri v Canada (Citizenship and Immigration)*, 2020 FC 86; *Rendon Segovia v Canada (Citizenship*

and Immigration), 2020 FC 99). On a standard of correctness review, the Court undertakes its own analysis and determines whether procedural fairness was violated by the decision of the administrative decision maker.

[17] In terms of reviewing the decision on its merits, the standard of reasonableness applies (*Vavilov*, para 10). Here again, this Court has ruled similarly on numerous occasions, including quite recently (*Singh v Canada (Citizenship and Immigration)*, 2020 FC 277; *Chen v Canada (Citizenship and Immigration)*, 2020 FC 111; *Olanrewaju v Canada (Citizenship and Immigration)*, 2020 FC 569). To be reasonable, a decision must be transparent, intelligible and justified, and the reviewing court—which is required to exercise judicial restraint and demonstrate respect for the role of the administrative tribunal (*Vavilov*, paras 13 and 75)—must be able to fully understand the reasons provided by the decision maker in order to determine whether the decision bears the hallmarks of reasonableness. Thus, an unreasonable decision would be one in which the reasons provided lack internal coherence, or that is untenable in light of the legal and factual constraints present in the case. Judicial review is not a treasure hunt for minor errors, and therefore requires a serious shortcoming in order to be allowed.

IV. Arguments and analysis

[18] The applicant argues with regard to procedural fairness that the RAD considered a new ground given that the additional elements relied on by the RAD to make its finding on the credibility of the refugee protection claim had not been decided on by the RPD. The applicant complained in her memorandum to the RAD that the conclusions reached by the RPD were based on secondary facts only. The applicant argues that additional submissions should have

been sought prior to rendering the decision that is under review if new information was to be considered that had not been considered by the RPD.

[19] At first blush, this argument might appear somewhat surprising given that the RAD was responding to the invitation extended by the applicant in her memorandum. The applicant stated that the central issue in her appeal was her credibility and invited the RAD to consider the record in order to reassess the evidence in its entirety. In fact, the applicant argued that the RPD had no advantage over the RAD in making findings of credibility. On closer examination, the decision under review endorses the RPD's findings that the summonses are merely sham documents. The summonses are not reliable documents in the circumstances of the case.

[20] The RAD examined this issue of credibility further, and made its own findings: the council's summonses indicate that the applicant was registered in the 3rd borough, whereas she actually lived and worked in the 5th borough. This, according to the RAD, was not determinative but added to other irregularities. Furthermore, other elements not put forward by the RPD emerged when the RAD listened to the recording of the hearing. For example, the film was not illegal or prohibited. In addition, the applicant did not explain why the police arrested her. When questioned about her fear of a hearing before the superior council of Islamic affairs, the applicant did not really articulate what she was afraid of. Finally, the women's rights association with which the applicant was associated is authorized by the interior ministry, and the applicant did not provide any details as to what the awareness activities involved beyond participating in [TRANSLATION] "meetings in kitchens" where photos were shown. This is from the evidence

before the RPD and is in addition to the findings made by the RPD. But these are new findings, whereas the applicant specifically complained about the weakness of the RPD's reasons.

[21] The respondent, meanwhile, argues that the determinative issue before the RPD was the same as that before the RAD: the credibility of the claim for refugee protection. It is indeed possible for the RAD to consider the entire file and draw its own conclusions as to the credibility of a claim.

[22] We will begin with the argument of breach of procedural fairness. There does not seem to be any doubt that if a new issue is raised on appeal to the RAD, notice should be given to the applicant (*Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 [*Ching*]). The question is determining what constitutes a new issue when credibility is the central issue in the RPD's decision. The applicant argues that new elements used by the RAD in discussing her credibility require that notice be provided to allow her to make submissions. The respondent maintains that if credibility is at the heart of an applicant's appeal, the RAD can make its own findings of credibility based on the record before it, without having to provide an opportunity for the applicant to comment on the new elements that were not the subject of the RPD's decision.

[23] In support of its position, the respondent cites a recent decision of this Court in *Corvil v Canada (Citizenship and Immigration)*, 2019 FC 300 [*Corvil*], in which it held that if credibility was raised before the RPD, there was no need to question the applicant further when the appeal to the RAD was initiated:

> [13] It goes without saying that when considering a question which was not raised before the RPD or by any of the parties to the

> appeal, the RAD must first notify the parties accordingly and give them an opportunity to respond thereto (*Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at para 71 [*Ching*]). However, it is now a well-established fact that when the credibility of a refugee protection claimant is at the heart of the RPD's decision and the grounds for appeal before the RAD, the RAD is entitled to make independent findings in this regard, without having to question the applicant or giving the applicant another opportunity to make submissions. That said, the RAD must avoid disregarding contradictory evidence on the record or making findings based on evidence unknown to the applicant (*Ibrahim v Canada (Citizenship and Immigration)*, 2016 FC 380 at paras 26, 30 [*Ibrahim*]; *Koffi v Canada (Citizenship and Immigration)*, 2016 FC 4 at para 38; *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 at para 24; *Marin v Canada (Citizenship and Immigration)*, 2018 FC 243 at paras 35–37 [*Rodriguez Marin*]; *Oluwaseyi Adeoye v Canada (Citizenship and Immigration)*, 2018 FC 246 at para 13 [*Adeoye*]).
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> [14] In this case, credibility was at the heart of the RPD's concerns and the subsequent rejection of the applicant's claim for refugee protection. It was also at the heart of the applicant's appeal to the RAD. Therefore, the RAD's independent finding regarding the date of issue of the Canadian visa affecting the applicant's credibility did not constitute a new issue, in and of itself, and did not involve contradictory evidence. Was this finding based on evidence unknown to the applicant? The answer is no, since the date of issue of the Canadian visa is clearly indicated in the record (Certified Tribunal Record [CTR] at pp 76, 102).
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> [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.
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> [Emphasis added.]

[24] The same approach was followed in *Yimer v Canada (Citizenship and Immigration)*, 2019 FC 1335. In that case, this Court, relying on *Corvil*, concluded that the RAD did not breach procedural fairness by using the record that was before the RPD to make its own determinations

on the evidence and find an additional basis to question credibility, given that credibility was at the heart of the decision before the RPD.

[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.

[27] The recent case law of this Court opens the door to this type of nuance. In *Isapourkhoramdehi v Canada (Citizenship and Immigration)*, 2018 FC 819, the Court stated:

> [18] Given that the RPD did not make an adverse credibility finding based on the lack of a baptismal certificate or the explanation given for this, in my view, procedural fairness required that the Applicant be afforded an opportunity to provide submissions on the issue if the RAD sought, as it did, to make and rely on credibility findings concerning that evidence.

Here, because it appears that the RPD did not make a finding as to credibility, whereas the RAD did, it is easier to see the matter as a new issue.

[28] But that was not the case in *Palliyaralalage v Canada (Citizenship and Immigration)*, 2019 FC 596, where the Court found that the applicant was correct in claiming a breach of the principle of procedural fairness when new findings of credibility were made without providing him with an opportunity to make submissions (para 9). Similarly, in *Laag v Canada (Citizenship and Immigration)*, 2019 FC 890, the RPD appears to have suggested that the information provided by the applicant at the hearing could easily have been memorized in preparation for testimony. The RAD went even further in reaching its credibility findings, which were therefore new and distinct from those of the RPD (paras 20–23). Procedural fairness was breached. Additionally, the Court noted the decision in *Husian v Canada (Citizenship and Immigration)*, 2015 FC 684, in which the Court stated 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" (para 10).

[29] The decision in *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 [*Kwakwa*], is noteworthy in this regard. The direct issue was whether the RAD had breached procedural fairness "by making additional credibility findings without sharing those concerns" (para 19). I reproduce paragraphs 24 and 25 of the decision, which I find enlightening:

> [24] 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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> [25] This is the case here. I conclude that, in reaching its decision, the RAD identified additional arguments and reasoning, going beyond the RPD decision subject to appeal, and yet did not afford Mr. Kwakwa with an opportunity to respond to them. More specifically, the RAD relied on arguments about the wording of Mr. Kwakwa's Congolese identity documents and asserted that there ought to be an address in the heading of the voter identity card and that a journalist card should not ask authorities to cooperate with the journalist. I find that the RAD made a number of additional comments regarding the documents submitted by Mr. Kwakwa in support of his Congolese identity, and that were not raised or addressed specifically by the RPD. It may be that these findings and arguments can effectively be supported by the evidence on the record, but I agree with Mr. Kwakwa that he should at least have been given an opportunity to respond to those

> arguments and statements made by the RAD before the decision was issued.
>
> [Emphasis added.]

[30] My review of recent case law from this Court persuades me that, as Justice Denis Gascon wrote in *Kwakwa*, "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" (para 29).

[31] I believe the matter before us is a good illustration of this proposition. The RPD rendered its decision on a very narrow basis: the summons from the superior council of Islamic affairs and a four-day delay in the United States before the applicant came to Canada and made a claim. The RPD found the summonses to be sham documents. In making this finding, it appeared to rely solely on the following:

- no date of issuance, only appearance dates;
- both summonses bear the same number;
- no reason for the summons is indicated;
- the form does not indicate "Mrs." along with "Mr. or Miss." The RPD noted that this observation is based on the specialized knowledge of the RPD member. No explanation of [TRANSLATION] "specialized knowledge" is provided.

The reasons for criticizing the applicant for the four days spent in the United States are no more eloquent: [TRANSLATION] "the failure to claim asylum in the United States adds to her lack of credibility" (RPD decision, para 8). This was certainly quite thin.

[32] On appeal, the applicant complained that the RPD's decision was based on [TRANSLATION] "secondary and inconclusive facts that were insufficient to reject her sworn testimony on a balance of probabilities" (CTR, p 17). The RAD sought further evidence from the record. For example, the RAD found additional incongruities both with respect to the summonses (summons to appear in a borough other than the borough in which the applicant lived and worked) and the testimony provided (film shown neither illegal nor prohibited; reasons for fearing the council; the association for which the applicant was an activist is authorized by the interior ministry, and her activities with that association are vague and repetitive). These incongruities had not been raised elsewhere and constitute sufficiently new reasons to warrant caution with respect to procedural fairness in a decision of such importance to the applicant.

[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.

[34] As I wrote in *Dalirani v Canada (Citizenship and Immigration)*, 2020 FC 258, circumspection is required when making findings of credibility in such matters (para 31). It should be borne in mind that the measure of procedural fairness is a function of the five factors originally set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*], and helpfully summarized in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48, [2004] 2 SCR 650:

> 5 The content of the duty of fairness on a public body varies according to five factors: (1) the nature of the decision and the decision-making process employed by the public organ; (2) the nature of the statutory scheme and the precise statutory provisions pursuant to which the public body operates; (3) the importance of the decision to the individuals affected; (4) the legitimate expectations of the party challenging the decision; and (5) the nature of the deference accorded to the body: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. In my view and having regard to the facts and legislation in this appeal, these considerations require the Municipality to articulate reasons for refusing the Congregation's second and third rezoning applications.

The statutory scheme does not in any way preclude notice to the appellant. A litigant's expectation is that their appeal will be considered for what it is: a challenge of the reasons supporting the decision. No one doubts the importance of the decision regarding a claim for refugee protection. As the Court of Appeals for the Second Circuit commented in *Lennon v Immigration and Naturalization Service*, 527 F.2d 187 (1975), deportation is not, of course, a

penal sanction, but in severity it surpasses all but the most Draconian criminal penalties. I believe it therefore calls for a greater measure of procedural fairness. In *Baker* (above), the Court provided a solid explanation of the rationale for deportation:

> 22 Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

[35] The rule of procedural fairness has obviously evolved over the centuries. A common law rule can be changed by statute (as Lord Bingham wrote in his *The Rule of Law*, Penguin Books, 2010, the prime characteristic of any common law rule is that it yields to a contrary provision of statute, p 167). Nowhere under "Appeal to Refugee Appeal Division" (ss 110 and 111 of the IRPA) do I find any indication that the common law rule of procedural fairness has been disregarded.

[36] It is true that the RAD operates without a hearing (except as otherwise specifically provided by the IRPA), on the basis of the record before the RPD. But this does not preclude, either directly or by necessary implication, compliance with the rules relating to the principle of procedural fairness.

[37] In my view, if this were simply a matter of supporting the RPD's finding, it would not be necessary to seek the applicant's submissions. However, the basis on which the RPD made its credibility finding is so tenuous (it was the very basis of the appeal) that in the circumstances of this case, the RAD's intervention constitutes new reasons.

[38] By that I mean that any new reasoning on credibility cannot be considered without giving notice to a person seeking refugee protection or person in need of protection status. That is not to say that any comment on credibility requires prior notice, as that would not constitute new reasoning.

[39] This Court has frequently indicated that a visa officer who has concerns about the credibility of a visa applicant should advise the applicant. This has become known as the "fairness letter" in the jargon of the trade. According to the *Baker* criteria, however, the degree of procedural fairness required is lower in the context of a visa than for a claim of refugee protection status in Canada. It seems to me that the same prudence should prevail where the RAD's concerns go well beyond what was expressed by the RPD (*Patel v Canada (Citizenship and Immigration)*, 2011 FC 571; *Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283, [2007] 3 FCR 501; *Talpur v Canada (Citizenship and Immigration)*, 2012 FC 25; *Farooq v Canada (Citizenship and Immigration)*, 2013 FC 164; *Ponican v Canada (Citizenship and Immigration)*, 2020 FC 232).

[40] Admittedly, the applicant did not promote clarity when, in her memorandum of appeal, she spoke in terms of the RAD conducting a [TRANSLATION] "*de novo*" analysis of the evidence

presented in its entirety and drawing its own conclusions. I have no doubt that the applicant's credibility was at the heart of this case: the RPD's decision is unambiguous, and the applicant's memorandum to the RAD is just as clear that the appeal is based on the credibility findings. The problem is that the RPD's decision was very thin, focusing almost exclusively on the summons that was found to be flawed (based in part on specialized knowledge that was not explained or justified). The RAD considered other elements that were proportionately better developed and more numerous, carrying greater weight. The resolution of this matter is largely based on the very particular facts of the case. When the RAD's decision is juxtaposed against that of the RPD, it appears that the RAD essentially decided on the basis of a new issue that was not the subject of the appeal.

V. Conclusion

[41] The more prudent course of action would be for the RAD to reconsider the appeal of the RPD decision. If the RAD believes that the credibility issue raised by the RPD and appealed from requires a more in-depth review of the evidence on the record, it should consider giving notice to the applicant so that she may provide submissions and comments. This is not intended to create a dialogue with the applicant, but rather to provide an opportunity for her to comment on matters that are important to the decision, matters that were not considered by the RPD. These elements are sufficiently far removed from the RPD's reasons as to go beyond the fine and blurred line mentioned in *Kwakwa* (above).

[42] Given the finding of breach of procedural fairness, it is neither necessary nor appropriate to consider whether the RAD's decision is reasonable. The RAD's inclusion of findings on the

credibility of the applicant without obtaining the applicant's submissions does not permit a review of the reasonableness of the decision at this stage.

JUDGMENT in IMM-7563-19

THIS COURT'S JUDGMENT is as follows**:**

1. The application for judicial review is allowed. The matter is referred back to the Refugee Appeal Division for redetermination by a different member.

2. The parties have agreed that the facts of this case are such that there is no serious question of general importance to be certified.

"Yvan Roy"
Judge

Certified true translation
Johanna Kratz, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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