

Federal Court



Cour fédérale

Date: 20220615

Docket: IMM-911-20

Citation: 2022 FC 899

Ottawa, Ontario, June 15, 2022

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

**PATRICK AKINBOBOLA TEMITOPE
ADUWO**

Applicant

and

**THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant is citizen of Nigeria who came to Canada on a Temporary Study Permit [TSP] to study computer science at Carleton University in Ottawa. He suffered significant mental health issues causing him to stop attending classes, and to become homeless for a period.

[2] The Applicant's father reported him missing to the police sometime around January 14, 2020. He was arrested on January 22, 2020 by the Canada Border Services Agency [CBSA]. On the same date, the Applicant was deemed inadmissible for contravening the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] and the requirements of his TSP. An Exclusion Order thus issued.

[3] The Applicant is pursuing this judicial review application to have the decision of the Minister's Delegate [Delegate] finding the Applicant inadmissible quashed and the Exclusion Order set aside, with the matter remitted for redetermination. In the meantime, this Court has stayed the Applicant's removal on March 24, 2021, pending the disposition of his judicial review application.

[4] Notwithstanding the Delegate's limited discretion in this matter, I find that the issuance of the Exclusion Order demonstrated a lack of procedural fairness in the circumstances, and hence, the decision to issue it was unreasonable. For the reasons that follow, I thus grant the Applicant's judicial review application.

II. Issues

[5] The Respondent raised a preliminary objection to the Applicant's supporting affidavits, or portions of them, as discussed below.

[6] Otherwise, I find there are two main issues for determination as follows:

(1) Did the Delegate correctly determine whether the Applicant was able to understand the nature of the proceedings pursuant to paragraph 228(4)(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR]?

(2) Was the Delegate's decision to issue the Exclusion Order reasonable?

[7] See Annex "A" for relevant legislative provisions.

III. Standard of Review

[8] The issue involving the Applicant's ability to understand the nature of the proceedings involves essentially a question of procedural fairness which attracts a correctness-like standard of review: *Benchery v Canada (Citizenship and Immigration)*, 2020 FC 217 [*Benchery*] at paras 8-9; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 77. The focus of the reviewing court is whether the process was fair in the circumstances: *Chaudhry v Canada (Citizenship and Immigration)*, 2019 FC 520 at para 24.

[9] The reasonableness standard of review applies to the second issue involving the merits of the decision, with the onus on the Applicant to demonstrate that the decision is unreasonable: *Vavilov*, at paras 10, 25, 100. To avoid judicial interference, the Delegate's reasons must be justified, intelligible and transparent, taking into account not only the outcome but also the reasoning process: *Vavilov*, at paras 86-87, 99.

IV. Analysis

(i) Preliminary issue – objection to Applicant’s affidavit evidence

[10] I find that the Applicant’s supporting affidavits generally are acceptable, subject to my conclusion regarding the inadmissibility of certain paragraphs, for the reasons below.

[11] The Respondent initially objected to the supporting affidavit evidence in the Applicant’s record because it was sworn by the Applicant’s father, Adegboyega Ademola Aduwo, rather than Applicant, and argued the application for leave and judicial review should be dismissed for want of a personal affidavit by the Applicant or, alternatively, the supporting affidavit evidence should not be given any weight. The Respondent also objected to further affidavits sworn by the Applicant’s father and submitted without leave. The Respondent did not pursue the latter objection at oral hearing. The supporting affidavits are four in number and dated March 9, 2020, July 30, 2020, March 19, 2021 and March 23, 2021. The latter two affidavits were submitted in support of the Applicant’s stay motion and accepted by this Court.

[12] There is somewhat inconsistent jurisprudence of this Court regarding the impact on the proceedings of affidavit evidence not sworn (or solemnly affirmed) by the Applicant, that I characterize as fatal, nearly fatal and not fatal, including:

- Fatal: *Fatima v Canada (Citizenship and Immigration)*, 2017 FC 1086 at para 5;
- Nearly Fatal (goes to weight): *Ebrahimshani v Canada (Citizenship and Immigration)*, 2020 FC 89 at paras 20-21; *Ismail v Canada (Citizenship and Immigration)*, 2016 FC 446 at para 21;

- Not Fatal (especially where the certified tribunal record contains necessary information):
Conka v Canada (Citizenship and Immigration), 2018 FC 532 at para 14; *Krah v Canada (Citizenship and Immigration)*, 2019 FC 361 at para 16.

[13] In my view, in circumstances where an applicant suffers from mental health issues or some other incapacitating condition, it makes good sense that an affidavit from another individual familiar with the applicant's situation be admitted and considered, so long as it is necessary and reliable: *R v Khan*, 1990 CanLII 77 (SCC), [1990] 2 SCR 531.

[14] In any event, I find it unnecessary to reconcile the above lines of cases. The Respondent conceded at the hearing of this matter that Rule 10(2) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, does not require the Applicant's supporting affidavits to have been sworn by the Applicant. The Respondent instead narrowed the complaint to the admissibility of paragraphs 11-16 in the March 9, 2020 affidavit and paragraphs 10-13 in the July 30, 2020 affidavit. Specifically, the Respondent submits that these paragraphs are inadmissible because they contain opinion and argument. I agree, with two exceptions. In my view, the second sentence of each of paragraph 13 and paragraph 12, in the March 9, 2020 and July 30, 2020 affidavits respectively, are more factual and, therefore, of the two groups of paragraphs to which the Respondent has objected I am prepared to admit these sentences, in addition to the balance of the affidavits.

(1) Applicant's ability to understand nature of proceedings

[15] I am persuaded that the Delegate failed to take steps necessary to determine whether the Applicant was capable of understanding the nature of the proceedings against him and that this was procedurally unfair in the circumstances.

[16] As Justice Pentney of this Court recently accepted, the purpose of paragraph 228(4)(b) of the *IRPR* is to protect vulnerable persons; a broad and liberal interpretation of such protection must be adopted and addressed as a question of procedural fairness: *Benchery*, at para 8.

[17] Although Justice Heneghan expressed a different view ("the Delegate's assessment of the Applicant's mental capacity is a question of mixed fact and law") in *Reid v Canada (Citizenship and Immigration)*, 2020 FC 222 [*Reid*] at para 49, I find that *Reid* is distinguishable. In that case, the only evidence of the applicant's mental incapacity was a medical report based on an interview conducted by a doctor more than a month after the applicant's immigration interview upon arrival in Canada. Justice Heneghan found that while the report raised doubt about the applicant's mental capacity, it was insufficient, without anything more, "to show that the Applicant did not know or understand what he said when he was questioned upon his arrival in Canada, first by the Officer and later, by the Delegate": *Reid*, at para 38. Further, the competing evidence of the Minister's delegate in *Reid* included an affidavit on behalf of the respondents on which the delegate was cross-examined.

[18] It is the case here that the Applicant's medical evidence showing that his mental health was deteriorating in the months preceding his arrest by the CBSA was not before the Delegate at the time of the decision. The Delegate referred specifically, however, to the Inland Enforcement Officer's notes, on which the *IRPA* s 44(1) report is based, and indicated concurrence with the Officer's recommendations. As I explain below, in my view the Officer's notes disclose that deterioration, discuss the medical evidence that was before the Officer, and make recommendations that, on their face, fail to consider the possibility that the Applicant's statements during the interview with the Officer were indicative that the Applicant did not understand or appreciate what was happening to him. I find that the Delegate's concurrence with the Officer's recommendations, coupled with the manner in which the Delegate conducted the subsequent interview with the Applicant, was procedurally unfair in the circumstances.

[19] The Officer's notes and the Delegate's notes, including the Administrative Removal Order Script, show the following timelines:

⇒ January 21, 2020

- 6 pm: Carleton University arrested the Applicant and handed him over to the Ottawa Police who took him to the Ottawa General Hospital; the Applicant was held overnight at his father's request so that the staff psychiatrist could assess the Applicant the next morning;
- 9 pm: The Officer arrived at the hospital and remained overnight;

⇒ January 22, 2020

- 1 pm: The Officer spoke with the staff psychiatrist;
- 1:10 pm: After the Applicant had eaten a full breakfast and lunch at the hospital where he was given extra food, the Officer took the Applicant into custody; he was transported to the Ottawa Inland Enforcement Office where he was interviewed; the Officer also gave him food at 1:45 pm;
- 2:25-2:36 pm: The Delegate interviewed the Applicant;
- 2:55 pm: The Delegate conveyed the decision to issue the Exclusion Order to the Applicant.

[20] The Officer's notes also indicate the Applicant's father had submitted an Order for Examination to Ottawa Police. Further, the notes disclose that the staff psychiatrist who assessed the Applicant at the hospital stated the Applicant appeared to have an untreated psychosis of which he may not be aware. While the notes reveal the staff psychiatrist told the Officer that the Applicant had the ability to fully understand and appreciate what was happening, they state that the staff psychiatrist provided a prescription to give to the psychiatrist at the Ottawa Carleton Detention Centre [OCDC] and indicated that the Applicant might require a follow-up from the OCDC psychiatrist.

[21] The Officer's notes also state that the Applicant's father told the Officer the Applicant had a mental illness but refused to take medication. The Officer also found the Applicant's father could not control the Applicant's behaviour nor persuade him to follow instructions or orders. The Officer provided no explanation why he expected that the Applicant's father should be controlling the behaviour of a grown adult who, in the Officer's view, is capable of understanding his circumstances.

[22] In any event, there is a disconnect, in my view, between the notes that recount the Officer's observations during the interview with the Applicant, and the Officer's conclusions that discount or ignore contradictory information about the Applicant's appearance or mental state.

The following are examples:

Conclusion	Contradictory Observation(s)
1 - He was appropriately dressed.	“He was appropriately dressed for the weather but his personal/physical appearance and hygiene as well as his belongings in his possession strongly suggested that he has been living on the streets for days or weeks.”
2 - He appeared oriented to date, time and place.	<p>“Mr. ADUWO stated that he has passed all his classes up to now with good and high grades which contradicted his school records showing his marks as “F” for all his classes in 2019 and parts of 2018.”</p> <p>- and -</p> <p>“Mr. ADUWO stated that he was residing with a room mate... in Ottawa. He stated that he last took shower on 21JAN2020... which [was] contradicted with his appearance being extremely dirty with street dirt and salt stains and an extremely strong body odour suggesting he had been living on the streets without showering.”</p> <p>- and -</p> <p>“When asked who he wanted to be contacted in the case of an emergency, he stated his room mate and not his father or sister. That room mate could not be confirmed and the phone number provided for the room mate appeared to be out of service.”</p>
3 - He was cooperative, polite and happy.	“During the interview, his answers were evasive. He was not truthful even when confronted with facts.”
4 - He maintained very good eye contact.	“He answered all the questions with very good eye contact but every time he provided an answer that contradicted my findings, he would put his head down and look the other way to answer while avoiding eye contact.”
5 - As he spoke, he was clear and was able to clearly explain his side.	See items 2, 3 and 4 above.
6 - Had the ability to understand what was asked from him. He was able to stay on topic and articulate when asked from him.	See items 2, 3 and 4 above.

[23] Based on the foregoing, the Officer nonetheless believed that the Applicant was able to clearly appreciate the nature of the proceedings. The Officer recommended the Applicant be detained until removed from Canada because of a lack of a suitable alternative to detention.

[24] Against this backdrop, the Delegate conducted an eleven-minute, scripted interview. I note that in other circumstances, the brevity of the Delegate's interview might not be an issue. I find that here, however, it is a relevant factor given the events leading up to the interview.

[25] The interview notes indicate the Delegate asked the Applicant only questions confirming his identity and questions about whether he understood what he was being told, to which he answered "yes." The Delegate gave the Applicant an opportunity provide evidence or a statement pertaining to the evidence, in response to which he explained that he had been studying on campus, had missed a week of classes and was trying to catch up. This occurred after the Applicant was provided a copy of the Officer's recommendations in the s 44(1) report. More significantly, in my view, it occurred within hours of the Applicant's release from the hospital where he underwent a mental health evaluation and was fed, and after being interviewed and fed again by the Officer. The Delegate's notes fail to disclose that the Delegate asked the Applicant any questions regarding his mental health.

[26] The Applicant had been made aware of evidence demonstrating that he had been absent from classes for an extended period, and that this information was before the Officer and Delegate. There is no indication that, given the evidence of potential mental illness including an untreated psychosis, the Delegate considered whether the Applicant's false statements might

reflect an inability to appreciate his situation or the proceedings against him. That the Applicant may have signalled his understanding, this is not inconsistent, in my view, with the Applicant not necessarily appreciating everything transpiring around him. There is no indication the Delegate took any steps to confirm his ability to appreciate the nature of the proceedings, as required under the *IRPR* s 228(4)(b), beyond asking simple questions about his identity and asking him if he understood. I am persuaded that, in the circumstances, this was insufficient and procedurally unfair.

[27] While the Respondent argues *Benchery* is analogous to the present case, the only evidence before the decision maker in *Benchery* that the applicant was not able to appreciate the nature of the proceedings were statements by immigration officers that the applicant appeared somewhat fragile at his hearing. Here, the information in the Officer's notes indicates that the Applicant may have an undiagnosed psychosis, that he had previously been on medication and refused to take it, that his father believed he needed this medication for his mental illness, and that the staff psychiatrist at the Ottawa General Hospital provided a prescription to, and recommended a follow-up from, the psychiatrist at the OCDC. This is much more than a statement that the Applicant appeared to be in a fragile state. In my view, it was incumbent on the Delegate to take some step to inquire about whether this Applicant's mental health rendered him incapable of appreciating the nature of the proceedings against him.

(2) Reasonableness of Delegate's decision to issue Exclusion Order

[28] I am satisfied that the Delegate's decision to issue the Exclusion Order was unreasonable in the circumstances.

[29] The Respondent argues that the Minister's limited discretion in the face of the Applicant's non-compliance with the *IRPA* and the TSP unlikely would result in a different outcome were the matter sent back for redetermination. As noted above, however, *Vavilov* guides that judicial review is concerned not only with the outcome but also with the reasoning process.

[30] The Delegate's notes indicate that the Delegate reviewed all the information in this case, and that the Delegate concurs with the Officer's recommendations. Further, the Delegate states that the Applicant understood the questions asked of him and that he understood the details and consequences of the Exclusion Order. Whether the Applicant understood the questions asked of, or the information conveyed to, him does not answer the penultimate question, in my view, of whether he appreciated the nature of the proceedings against him, and demonstrates a lack of justification, for the outcome, that is the decision to issue the Exclusion Order at that time.

V. Conclusion

[31] The Delegate's decision to issue an Exclusion Order under the *IRPR* s 228(1) required the Delegate to confirm the Applicant's ability to understand the nature of the proceedings pursuant to the *IRPR* s 228(4)(b). For the above reasons, I conclude that, when confronted with the Applicant's mental health issues here, the Delegate's failure to take steps to confirm the Applicant's ability to appreciate the nature of the proceedings, beyond simply and insufficiently asking if he understood, is a breach of procedural fairness, and one that renders the decision to issue the Exclusion Order unreasonable.

[32] I therefore grant the Applicant's judicial review application.

[33] Neither party proposed a serious question of general importance for certification and I find that none arises in the circumstances.

JUDGMENT in IMM-911-20

THIS COURT'S JUDGMENT is that:

1. The Applicant's judicial review application is granted.
2. The Respondent's decision and Exclusion Order dated January 22, 2020 are set aside.

The matter will be remitted to a different Delegate for redetermination.

3. There is no question for certification.

"Janet M. Fuhrer"

Judge

Annex “A” – Relevant Provisions

Immigration and Refugee Protection Act, SC 2001, c 27
Loi sur l’immigration et la protection des réfugiés, LC 2001, ch 27

<p>Rights and Obligations of Permanent and Temporary Residents Obligation — temporary resident</p> <p>29 (2) A temporary resident must comply with any conditions imposed under the regulations and with any requirements under this Act, must leave Canada by the end of the period authorized for their stay and may re-enter Canada only if their authorization provides for re-entry.</p>	<p>Droits et obligations des résidents permanents et des résidents temporaires Obligation du résident temporaire</p> <p>29 (2) Le résident temporaire est assujéti aux conditions imposées par les règlements et doit se conformer à la présente loi et avoir quitté le pays à la fin de la période de séjour autorisée. Il ne peut y rentrer que si l’autorisation le prévoit.</p>
<p>Inadmissibility Non-compliance with Act</p> <p>41 A person is inadmissible for failing to comply with this Act</p> <p>(a) in the case of a foreign national, through an act or omission which contravenes, directly or indirectly, a provision of this Act; and</p>	<p>Interdictions de territoire Manquement à la loi</p> <p>41 S’agissant de l’étranger, emportent interdiction de territoire pour manquement à la présente loi tout fait — acte ou omission — commis directement ou indirectement en contravention avec la présente loi et, s’agissant du résident permanent, le manquement à l’obligation de résidence et aux conditions imposées.</p>
<p>Report on Inadmissibility Preparation of report</p> <p>44 (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.</p>	<p>Constat de l’interdiction de territoire Rapport d’interdiction de territoire</p> <p>44 (1) S’il estime que le résident permanent ou l’étranger qui se trouve au Canada est interdit de territoire, l’agent peut établir un rapport circonstancié, qu’il transmet au ministre.</p>

Immigration and Refugee Protection Regulations, SOR/2002-227
Règlement sur l'immigration et la protection des réfugiés (DORS/2002-227)

<p>Restrictions on Studying in Canada</p> <p>Conditions — study permit holder</p> <p>220.1 (1) The holder of a study permit in Canada is subject to the following conditions:</p> <p>(a) they shall enroll at a designated learning institution and remain enrolled at a designated learning institution until they complete their studies; and</p> <p>(b) they shall actively pursue their course or program of study.</p>	<p>Restrictions applicables aux études au Canada</p> <p>Conditions — titulaire du permis d'études</p> <p>220.1 (1) Le titulaire d'un permis d'études au Canada est assujetti aux conditions suivantes :</p> <p>a) il est inscrit dans un établissement d'enseignement désigné et demeure inscrit dans un tel établissement jusqu'à ce qu'il termine ses études;</p> <p>b) il suit activement un cours ou son programme d'études.</p>
<p>Specified Removal Order Subsection 44(2) of the Act — foreign nationals</p> <p>228 (1) For the purposes of subsection 44(2) of the Act, and subject to subsections (3) and (4), if a report in respect of a foreign national does not include any grounds of inadmissibility other than those set out in the following circumstances, the report shall not be referred to the Immigration Division and any removal order made shall be</p> <p>...</p> <p>(c) if the foreign national is inadmissible under section 41 of the Act on grounds of</p> <p>...</p> <p>(v) failing to comply with subsection 29(2) of the Act as a result of non-compliance with any condition set out in paragraph 183(1)(d), section 184 or subsection 220.1(1), an exclusion order,</p> <p>...</p>	<p>Mesures de renvoi à prendre Application du paragraphe 44(2) de la Loi : étrangers</p> <p>228 (1) Pour l'application du paragraphe 44(2) de la Loi, mais sous réserve des paragraphes (3) et (4), dans le cas où elle ne comporte pas de motif d'interdiction de territoire autre que ceux prévus dans l'une des circonstances ci-après, l'affaire n'est pas déferée à la Section de l'immigration et la mesure de renvoi à prendre est celle indiquée en regard du motif en cause :</p> <p>...</p> <p>c) en cas d'interdiction de territoire de l'étranger au titre de l'article 41 de la Loi pour manquement à :</p> <p>...</p> <p>(v) l'une des obligations prévues au paragraphe 29(2) de la Loi pour non-respect de toute condition prévue à l'alinéa 183(1)d), à l'article 184 ou au paragraphe 220.1(1), l'exclusion,</p> <p>...</p>

Reports in respect of certain foreign nationals

(4) For the purposes of subsections (1) and (1.1), a report in respect of a foreign national does not include a report in respect of a foreign national who

...

(b) is unable, in the opinion of the Minister, to appreciate the nature of the proceedings and is not accompanied by a parent or an adult legally responsible for them.

Affaire à l'égard de certains étrangers

(4) Pour l'application des paragraphes (1) et (1.1), l'affaire ne vise pas l'affaire à l'égard d'un étranger qui :

...

b) soit n'est pas, selon le ministre, en mesure de comprendre la nature de la procédure et n'est pas accompagné par un parent ou un adulte qui en est légalement responsable.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-911-20

STYLE OF CAUSE: PATRICK AKINBOBOLA TEMITOPE ADUWO v
THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS

PLACE OF HEARING: HELD VIA VIDEOCONFERENCE

DATE OF HEARING: MAY 25, 2022

JUDGMENT AND REASONS: FUHRER J.

DATED: JUNE 15, 2022

APPEARANCES:

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Geneviève Tremblay-Tardif FOR THE RESPONDENT

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