Federal Court of Appeal  Cour d'appel fédérale

Date: 20220201

Docket: A-216-20

Citation: 2022 FCA 18

CORAM: **WEBB J.A.**
MACTAVISH J.A.
LEBLANC J.A.

BETWEEN:

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Appellant

and

LOTFI ABDULRAHMAN AHMED BAFAKIH, SUAAD BAFAKIH, ABDULRAHMAN LOT BAFAKIH, AHMED BAFAKIH

Respondents

Heard at Toronto, Ontario, on September 28, 2021.

Judgment delivered at Ottawa, Ontario, on February 01, 2022.

REASONS FOR JUDGMENT BY: LEBLANC J.A.

CONCURRED IN BY: WEBB J.A.
MACTAVISH J.A.

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REASONS FOR JUDGMENT

LEBLANC J.A.

[1] This is an appeal by the Minister of Public Safety and Emergency Preparedness (the Minister) from a judgment of Russell J. of the Federal Court (the Application Judge). In his judgment dated June 15, 2020 (2020 FC 689), the Application Judge set aside a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada

(the Review Panel), rendered orally on May 28, 2019 (Toronto TB8-11918, TB8-11919, TB8-11920 and TB8-11921), vacating, as permitted by section 109 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), a decision of the then Convention Refugee Determination Division (the Original Panel) allowing the respondents' claim for refugee protection.

[2] Section 109 of the Act confers on the Refugee Protection Division (RPD) the discretion to vacate a positive refugee determination if it finds that 1) the decision was obtained as a result of the refugee claimant directly or indirectly misrepresenting or withholding material facts relevant to his or her claim and, 2) leaving the misrepresentations aside, that the remaining evidence that was before the panel which decided the refugee claim was insufficient to justify granting protection.

[3] Here, the Review Panel found that the respondents, a family of four from Yemen, had obtained refugee protection as a result of withholding their connections to a potential country of reference, Kenya. According to the Review Panel, this information, if disclosed, would have raised suspicions for the Original Panel and could have led to further inquiries regarding the respondents' potential Kenyan nationality.

[4] This finding was held to be unreasonable by the Application Judge on the ground that there was no evidence on record establishing that this information, if disclosed, would have been material to the actual granting of refugee status. Said information, according to the Application Judge, was only material to a possible line of inquiry that would have led nowhere,

since nothing in the evidence before him suggested that the respondents had any right to Kenyan nationality or that Kenya was, therefore, a possible country of reference.

[5] The Application Judge certified the following question:

> Before vacating a decision granting refugee protection under [subsection] 109(1) of the [Act], is the Respondent required to demonstrate, and is the [Refugee Protection Division (RPD)] required to find, a misrepresentation or withholding of a material fact that would have led to a different conclusion by the original RPD panel, or is it sufficient for the RPD to find a misrepresentation or withholding of a material fact that could have led to a possible line of inquiry that may, or may not, have resulted in a denial of refugee protection by the original RPD panel?

[6] On December 7, 2021, a few weeks after the hearing of this appeal, the Court directed the parties to provide additional submissions on one element of the certified question, as it found that said question "presupposes that a finding was made by the RPD that there was a misrepresentation or withholding of a material fact". This element of the certified question is:

> Before vacating a decision granting refugee protection under subsection 109(1) of the *Immigration and Refugee Protection Act*, is the Refugee Protection Division required to find that there was a misrepresentation or withholding of a material fact?

[7] In joint submissions filed on December 21, 2021, in response to the Court's direction, the parties submitted that the RPD, before vacating a decision granting refugee protection under subsection 109(1) of the Act, was required to find that there was a misrepresentation or withholding of a material fact, adding that there was no dispute between them as to whether the RPD had made a misrepresentation finding in the present matter. The dispute between them, the

parties assert is rather whether this finding was reasonable and whether the Application Judge properly assessed whether the respondents' refugee protection was obtained as a result of the withholding of material facts.

[8] I do agree that the RPD is required to find that there was a misrepresentation or withholding of a material fact before vacating protection but for the following reasons, which differ from those of the Application Judge, I am of the view that the Review Panel's decision in this matter does not withstand scrutiny.

I. The Underlying Facts

[9] The respondents entered Canada in May 1998 and sought refugee protection shortly thereafter on the basis that they were harassed and persecuted by a prominent Yemeni government figure. The Original Panel accepted their claim.

[10] A few months later, the Minister intercepted a package of documents sent to the respondents from the United States. That package contained identity cards (ID cards) listing the place of birth of the adult respondents, Lotfi Abdulrahman Ahmed Bafakih (Lotfi) and Suaad Bafakih (Suaad), as Mombasa, Kenya. This prompted the Minister to request, and obtain, from the Kenyan authorities biometric records showing that Lotfi and Suaad were registered Kenyan nationals. The Kenyan authorities also provided the Minister with a copy of application forms for Kenyan ID cards submitted in 1994 by individuals with similar names in which Mombasa also appeared as the place of residence.

[11] With this information in hand, the Minister sought to have the Original Panel's decision vacated. He claimed that the biometric records matched Kenyan records and the ID cards application forms provided by the Kenyan authorities suggested that Kenya could have been a country of reference for the purposes of the refugee claim. The Minister further argued that the withholding of this information had therefore precluded the Original Panel from engaging in a fulsome analysis of the respondents' Kenyan ties.

[12] The respondents denied any ties, past or current, to Kenya, although Lotfi admitted having used, in 1994, the services of a third party who had connections with that country in hopes of obtaining a Kenyan ID card, which never materialized. He insisted that these actions were prompted by his desire to settle outside Yemen as Yemen was facing political turmoil at the time. He further claimed that he chose Kenya not because he had any right to Kenyan citizenship, but because the Kenyan passport was more respected at the time and would help him access job opportunities in the Arab Gulf.

[13] In the course of the hearing before the Review Panel, the respondents filed some documentary evidence which satisfied the Review Panel that both Lotfi and Suaad were in fact born in Yemen. They also filed affidavits from Lotfi's parents where both affirmed, among other things, having been born in the 1940s in geographical areas now part of Kenya.

II. The Review Panel's Decision

[14] The Review Panel held that the new information arising from Lotfi's parents' affidavits showed that Lotfi could have obtained Kenyan citizenship by descent. This, coupled with the evidence of Lotfi's efforts to obtain Kenyan ID cards, were material facts which ought to have been disclosed to the Original Panel as such matters—identity, nationality and potential country of reference—go to the very core of refugee protection.

[15] In concluding as it did, the Review Panel declined to determine whether there was any legal basis for considering Kenya as a country of potential nationality for the respondents. It insisted that this issue would have been for the Original Panel to consider, had the respondents' connections to that country been disclosed in due course. For the Review Panel, the respondents' failure to disclose their Kenyan connections was enough to engage subsection 109(1) of the Act as such failure precluded a line of inquiry that, potentially, could have led the Original Panel to refuse their refugee claim.

[16] The Review Panel was also satisfied that there was no other sufficient evidence before the Original Panel "that goes towards any claim against Kenya" that would have otherwise justified granting protection to the respondents as per subsection 109(2) of the Act. For the Review Panel, "[t]here's really nothing upon which the [Original Panel], in 1999, could have evaluated a claim against Kenya or the potential for Kenya to be a country of reference" (Review Panel's decision at 8).

III. The Application Judge's Decision

[17] Noting that the Review Panel had made no determination as to whether Kenya was or was not a country of reference, the Application Judge found the Review Panel's approach to section 109 of the Act to be "fundamentally flawed". According to the Application Judge, if any connection the respondents may have had with Kenya in 1999 was not capable of yielding Kenyan nationality, then there could be no withholding of material facts relating to a relevant matter. He stressed that subsection 109(1) of the Act required the Review Panel to be satisfied that the Original Panel's decision "was obtained" as a result of the respondents' failure to mention Kenya, not that it "could have been obtained" because of such omission.

[18] The Application Judge contrasted the language of subsection 109(1) with the language of paragraph 40(1)(*a*) of the Act, which provides for the inadmissibility of non-citizens for misrepresentation for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter "that induces or could induce" an error in the administration of the Act, noting that this language, which sets out a broader test for inadmissibility, has not been reproduced in subsection 109(1).

[19] The Application Judge further held that it was equally unreasonable to vacate the Original Panel's decision on the ground that the Original Panel "could have" assessed Kenya as a possible country of reference because there is no evidence on record that the respondents had any right to Kenyan citizenship and, therefore, no evidence they misrepresented anything material. In particular, he determined that there was no evidence suggesting that the fact that Lotfi's parents

were born in what is now Kenya provided the respondents with any right to Kenyan citizenship. In other words, the Application Judge was satisfied that the possible line of inquiry the Original Panel was precluded from undertaking as a result of the respondents' failure to reveal their Kenyan connections would have led nowhere.

[20] The Application Judge concluded that the Minister had failed to establish that the respondents' omissions were material to the granting of their refugee claim as he was satisfied that the possible line of inquiry which the omissions prevented could not have led to the refusal of said claim.

IV. The Minister's Challenge to the Application Judge's Decision

[21] The Minister's challenge to the Application Judge's decision is twofold. First, he contends that the Application Judge adopted the wrong legal test by requiring the Minister to establish that the outcome of the respondents' refugee proceedings would definitely have been different had the Original Panel had access to the full evidentiary record. He claims that subsection 109(1) of the Act only requires him to demonstrate that there was a material withholding related to a relevant matter and that there is a causal connection between the withholding and the granting of protection which could have led to a different conclusion. He urges the Court to answer the certified question in those terms.

[22] Second, the Minister submits that the Review Panel reasonably found that the respondents, by withholding all information pointing to Kenya, obtained refugee protection as a

result of material withholdings as the non-disclosed facts raised issues of identity, nationality and potential country of reference, which all go to the core of refugee protection. He further submits that the documents provided by the Kenyan authorities as evidence of a biometric records match was further evidence that refugee protection was obtained by the respondents as a result of withholding material facts, but claims that the Review Panel failed to provide a reasonable explanation for discounting it.

V. Issue and Standard of Review

[23] It is trite that on appeal from a decision of the Federal Court sitting in judicial review, this Court must determine whether the Federal Court chose the appropriate standard of review and, if so, whether it properly applied it in reviewing the impugned administrative decision. This requires the Court to "step into the shoes" of the Federal Court and effectively focus on the administrative decision under review (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-46).

[24] Recently, the Supreme Court of Canada, in *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, 462 D.L.R. (4th) 585 (*Horrocks*), declined the invitation to reconsider *Agraira*, and confirmed that its principles continue to apply. The *Agraira* approach, according to *Horrocks*, "accords no deference to the reviewing judge's application of the standard of review"; it rather requires the Court to "perform[] a *de novo* review of the administrative decision" (*Horrocks* at para. 10).

[25] Here, applying the review framework laid out by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 (*Vavilov*), the Application Judge chose to review the Review Panel's decision on the presumptive standard of reasonableness. The parties do not dispute that this was the correct choice.

[26] Keeping in mind the certified question, as broken down, the Court's task, "stepping into the shoes" of the Federal Court, is to determine whether the Review Panel's decision is reasonable. It is settled law that the reasonableness standard applies to "all aspects" of an administrative decision, including the decision maker's interpretation of its enabling statute (*Vavilov* at para. 25).

[27] On a reasonableness review, the focus of the inquiry "must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para. 83). Ultimately, the reviewing court must be satisfied that the administrative decision is "based on an internally coherent and rational chain of analysis and […] is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para. 85).

[28] Before getting into the analysis, it is important to bear in mind that the certification of a question serves a "triggering" function by which an appeal under the Act is permitted (*Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909 at para. 44; citing *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 at para. 12). That said, once properly triggered, it is well settled that all

aspects of the appeal may be considered by the Court. In other words, the appeal is not restricted to the determination of the certified question (*Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344 at para. 50).

VI. Analysis

[29] As indicated at the outset of these reasons, the question put to this Court by the Application Judge pertains to the test to be applied by the RPD before vacating a decision granting refugee protection under subsection 109(1) of the Act. As indicated as well, this Court sought additional submissions on one aspect of this question, which is whether the RPD, before rendering such a decision, is required to find that there was a misrepresentation or withholding of a material fact. The parties responded, jointly, that it was.

[30] This aspect of the certified question is important because, as underscored in the direction requesting additional submissions on that point, that question, as framed by the Application Judge and as treated by the parties, presupposes that a finding was made by the Review Panel that there was a misrepresentation or withholding of a material fact.

[31] Yet, the fundamental problem in this matter, as I see it, is that although the parties agree—correctly so in my view—that the RPD is required to find that there was a misrepresentation or withholding of a material fact before vacating a grant of refugee status, the Review Panel in the present matter improperly declined to address this issue. More particularly, it declined to engage on the issue of the materiality of the omissions attributed to the respondents

regarding their connections to Kenya. Instead, the Review Panel focused on whether these omissions resulted in the grant of refugee protection by the Original Panel, thereby sidestepping a critical step in the analysis. This was, in my view, a fatal error.

[32] Subsection 109(1) of the Act reads as follows:

Vacation of refugee protection	**Demande d'annulation**
109 (1) The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.	**109 (1)** La Section de la protection des réfugiés peut, sur demande du ministre, annuler la décision ayant accueilli la demande d'asile résultant, directement ou indirectement, de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait.

[33] It is well settled that where an individual claiming refugee protection has citizenship in more than one country, the individual must demonstrate a well-founded fear of persecution in relation to each of these countries before he or she can seek asylum in a country of which he or she is not a citizen (*Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1 at 751). This principle extends to cases where, at the time the claim is heard, the claimant is entitled to acquire the citizenship of a particular country by completing mere formalities, "thereby leaving no room for the State in question to refuse status" (*Canada (Citizenship and Immigration) v. Williams*, 2005 FCA 126, [2005] 3 F.C.R. 429 at paras. 19-21).

[34] There is no doubt, therefore, that the omissions attributed to the respondents in the present matter were related to a "relevant matter", as required by subsection 109(1) of the Act. However, to trigger the vacating of the Original Panel's decision, those omissions also needed to be material. This is entirely consistent with the language of subsection 109(1), which requires that the decision to allow a claim for refugee protection be the result of "directly or indirectly misrepresenting or withholding material facts related to a relevant matter".

[35] This is entirely consistent as well with the jurisprudential three-step test the Review Panel referred to in its decision. This test requires that (i) that there be "a misrepresentation or withholding of material facts;" (ii) that those facts "relate to a relevant matter; and" (iii) that there be "a causal connection between the misrepresenting or withholding on the one hand and the favourable result on the other" (*Canada (Public Safety and Emergency Preparedness) v. Gunasingam*, 2008 FC 181, 73 Imm. L.R. (3d) 151 at para. 7). (emphasis added)

[36] Thus, in order to get to the third and ultimate step of the test, there need to be prior findings that not only does the withheld information relate to a "relevant matter", but also that it concerns "material facts".

[37] Here, the problem lies in the manner in which the materiality issue was addressed by the Review Panel. After having found that there was "some evidence by the Minister" that Lotfi could have obtained Kenyan citizenship by descent, the Review Panel held that it did not have to "analyze now in May 2019, the law of Canadian [sic] citizenship for Kenya as it was back then in 1999" (Review Panel's decision at 5). It held as well that it did not have to ask the Minister

"to hunt for documents from various family members to determine if they lost their citizenship to Kenya and if so, how the respondents could have been able to re-obtain their citizenship to Kenya, as of 1999" (Review Panel's decision at 5).

[38] Clearly, the Review Panel felt that it was not within the purview of its authority under subsection 109(1) of the Act to determine whether the respondents, based on all the evidence that was before it, had any right to Kenyan citizenship. However, if no such right emerged from the evidence, as determined by the Application Judge, then the omissions attributed to the respondents could not possibly be held to be material.

[39] The position taken by the Review Panel on this issue is at odds with binding precedents which constrain how and what it can reasonably decide (*Vavilov* at para. 112).

[40] In *Canada (Minister of Citizenship and Immigration) v. Wahab*, 2006 FC 1554, 305 F.T.R. 288 (*Wahab*), Gauthier J. (now a judge of this Court), provided a useful jurisprudential review, which I fully endorse, of the principles governing applications made pursuant to section 109 of the Act. In particular, she reaffirmed the principle that under subsection 109(1), it is incumbent upon the RPD not only to identify the nature of the misrepresentations or omissions put forth by the competent minister in his application, but also to determine the extent to which these misrepresentations or omissions may have been material (*Wahab* at para. 43). She also reaffirmed the principle that this determination "involves consideration of all the evidence on file, including the new evidence presented by both parties" (*Wahab* at para. 29; see also *Coomaraswamy v.*

Canada (Minister of Citizenship and Immigration), 2002 FCA 153, [2002] 4 F.C. 501 at paras. 16-17).

[41] In *Wahab*, just as in the present matter, the RPD had to decide whether the respondent had misrepresented being a citizen of only one country—Iraq—while he was also in possession of a Russian passport. Gauthier J. held that the subsection 109(1) determination required two distinct findings of fact by the RPD. First, she said, the RPD had to decide whether the Russian foreign documents on record (passport and grant of citizenship) were forged documents or were genuine documents issued on the basis of fraudulent representations (*Wahab* at para. 39). Second, the RPD had to consider and evaluate "the legal effect of the grant of citizenship" obtained by the respondent at the time his refugee claim was considered by the original decision-maker. This, according to Gauthier J., involved looking at the Russian statutes put in evidence by the Minister (*Wahab* at para. 41).

[42] Here, the Review Panel did none of that, despite having before it, among other things, the provisions of the Kenyan Constitution of 1963 and 2010 dealing with citizenship, which suggested that children of Kenyan citizens may be entitled to Kenyan citizenship by descent, thereby leaving the issue of the materiality of the omissions attributed to the respondents inadequately answered.

[43] *Hassan v. Canada (Minister of Citizenship and Immigration)*, 174 F.T.R. 288, 1999 CanLII 8795 (F.C.T.D.) (*Hassan*) reaffirmed that an individual facing vacating proceedings was "entitled to the clearest assurance that the Refugee Division has given full and fair consideration

to the evidence" (*Hassan* at para. 23). In that case, Mr. Hassan's refugee status was vacated on the ground that contrary to what he had represented to the original panel, he was not a citizen of Somalia, but of Kenya. The review panel found that there was no credible evidence that Mr. Hassan was a citizen of Somalia or that he had obtained Kenyan citizenship by fraud. The lack of credibility of Mr. Hassan's testimony was fundamental to the panel's decision (*Hassan* at para. 16).

[44] Evans J. (a former judge of this Court) held that the review panel had failed to come to grips with the content of a medical report which offered an explanation for the deficiencies in Mr. Hassan's testimony that led the review panel to find that the testimony was not credible (*Hassan* at para. 20). In Evans J.'s view, "[i]f the panel had believed Mr. Hassan's evidence that he had been born in Somalia and obtained his Kenyan passport on the basis of a false birth certificate, it could not have found that he was guilty of misrepresentation or concealment" (*Hassan* at para. 16). (emphasis added)

[45] Similarly, in the present matter, if the Review Panel had given "full and fair consideration to the evidence" and concluded that the respondents had no right to Kenyan citizenship, "it could not have found that [they were] guilty of misrepresentation or concealment". In other words, it could not have found that the respondents' omissions regarding their connections to Kenya were material.

[46] Again, the Review Panel was required to find that there was a misrepresentation or withholding of a material fact before vacating the Original Panel's decision. However, it

improperly declined to engage on the issue of the materiality of the omissions attributed to the respondents regarding their connections to Kenya. Instead, it focused on whether these omissions resulted in the grant of refugee protection by the Original Panel, thereby sidestepping a critical requirement of the subsection 109(1) analysis. This affected the reasonableness of its vacating order.

[47] This error was sufficient to set aside the Review Panel's decision. It is, in my view, determinative of the present appeal. Therefore, the other component of the certified question need not be decided. The other component is whether the RPD, before vacating a grant of refugee protection, is required to find a misrepresentation or omission of a material fact (i) that would have led to a different conclusion by the original panel, or (ii) that could have led to a possible line of inquiry that may, or may not, have resulted in a denial of refugee protection by the original panel.

[48] As indicated in the Court's direction issued on December 7, 2021, the certified question, as framed by the Application Judge, presupposes that a finding that there was a misrepresentation or withholding of a material fact was made by the RPD. This was not done in the present matter, whereas the Review Panel was required to make such a finding. This failure being determinative of the present appeal, there is no need to answer this other component of the certified question.

[49] As alluded at the outset of these reasons, although I agree with the Application Judge that the Review Panel's decision is unreasonable and must be set aside, I do so for reasons that differ from his. This has implications on the manner the Court is to dispose of the present appeal.

[50] The essence of the Application Judge's finding, as I see it, is that the omissions attributed to the respondents regarding their Kenyan connections were not material. In his view, the Review Panel's decision could not reasonably be sustained no matter what the subsection 109(1) test is. This is because there is no evidence that any connection the respondents might have had with Kenya in 1999 was capable of yielding Kenyan nationality, or that the line of inquiry the Original Panel was precluded from undertaking would have led to a finding that the respondents had a right to Kenyan citizenship.

[51] This finding, quite apart from the fact that one could say it is problematic in light of the evidence respecting the Kenyan citizenship requirements, was for the Review Panel to make, not the Application Judge. Although the Application Judge identified—correctly so—the standard of reasonableness as the standard of review applicable to the impugned decision, he deviated from it and in fact proceeded to a correctness review of that decision.

[52] As reaffirmed in *Vavilov*, a reviewing court applying the standard of reasonableness must refrain from deciding itself the issues that were before the administrative decision-maker. In other words, it "does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the 'range' of possible conclusions that

would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the 'correct' solution to the problem." (*Vavilov* at para. 83).

[53] Here, by making his own finding regarding the materiality of the omissions attributed to the respondents, the Application Judge exceeded what he was empowered to do in reviewing the Review Panel's decision. In fact, he took it upon himself to make a finding on an issue that the Review Panel had declined to entertain. That, he could not do.

VII. Conclusion

[54] It follows that I would dismiss the appeal, as I agree with the Application Judge, albeit for different reasons, that the Review Panel's decision must be set aside and the matter remitted to the RPD for reconsideration by a differently constituted panel. I would also only answer the component of the certified question for which the Court sought additional submissions from the parties on December 7, 2021. I would do so in the affirmative.

[55] For clarity, as a result of dismissing the appeal, the Review Panel's decision will need to be reconsidered in accordance with these reasons, not the Application Judge's reasons, which, with all due respect again, I cannot endorse.

[56] As neither party has invoked "special reasons" within the meaning of section 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, which would warrant an award of costs, I propose that the appeal be dismissed without costs.

"René LeBlanc"
J.A

"I agree
Wyman W. Webb J.A."

"I agree
Anne L. Mactavish J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-216-20
STYLE OF CAUSE:	MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDENESS v. LOTFI ABDULRAHMAN AHMED BAFAKIH, SUAAD BAFAKIH, ABDULRAHMAN LOT BAFAKIH, AHMED BAFAKIH
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 28, 2021
REASONS FOR JUDGMENT BY:	LEBLANC J.A.
CONCURRED IN BY:	WEBB J.A. MACTAVISH J.A.
DATED:	FEBRUARY 01, 2022

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