

Federal Court



Cour fédérale

**Date: 20220506**

**Docket: IMM-3245-20**

**Citation: 2022 FC 669**

**Ottawa, Ontario, May 6, 2022**

**PRESENT: The Honourable Mr. Justice Favel**

**BETWEEN:**

**HAJA DRAMMEH  
MOHAMMED GIKINEH  
AMINATA GIKINEH**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Nature of the Matter**

[1] Haja Drammeh, the Principal Applicant [PA], seeks judicial review of the Refugee Protection Division's [RPD] June 26, 2020 decision [Decision] where the RPD found that the Applicants are not Convention refugees or persons in need of protection within the meaning of

sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The determinative issue for the RPD was credibility.

[2] The application for judicial review is allowed.

## II. Background

[3] The PA is a citizen of The Gambia and a member of a devout Muslim tribe called the Soninke Tribe. She fears persecution in The Gambia because her family will force her into a pre-arranged marriage with her cousin, Abdoulie. She also states that the police will not protect her because they do not get involved in traditional family disputes and they will be bribed by her family. The other applicants are the PA's children, a son and a daughter [Minor Applicants], who were born in the United States [US] and are US citizens. If returned to The Gambia, the PA fears that her daughter will be subject to female genital mutilation [FGM].

[4] The PA underwent FGM herself when she was one year old. At that time, Abdoulie who was 28 or 29 years old, was chosen as her future husband and she was to marry him when she turned 18 years old.

[5] The PA has two biological siblings, a sister who is a Canadian citizen and a brother who is now deceased. The PA's biological father died in 1997, after which her mother was "inherited to her uncle", Abubacarr Drammeh [Abubacarr], who became her stepfather.

[6] As the PA matured, her parents monitored her behaviour and her mother physically examined her every month to ensure she was a virgin. The PA did not want to marry Abdoulie and while in high school, she researched arranged marriages online and learned that having unwanted sex was rape. The PA's teacher and the PA's brother pleaded with the PA's parents to abandon the arranged marriage, but Abubacarr would not consider this. The Applicant was set to be married to Abdoulie in the spring of 2013.

[7] In 2012, the PA's brother obtained a green card from the US and moved to New York. In February 2013, two months before the planned marriage, a colleague of the PA's brother came to The Gambia and brought the PA to New York. The PA travelled on a fake passport. The PA stayed with her brother but in 2015 he was killed. The PA continued to stay in the US without status until she came to Canada on August 18, 2017. While in the US, the PA met a man and they had the Minor Applicants. The PA and the Minor Applicants' father are no longer together and the Minor Applicants are with the PA in Canada, with their father's permission.

[8] While in the US, the PA consulted two lawyers. The first lawyer did not give her advice or information and the second lawyer informed her that she was not eligible to make a refugee claim due to the one-year bar in the US.

[9] The PA came to Canada because she was unable to support herself in the US and she has a sister living in Toronto. When she arrived in Canada, the PA made a refugee claim. Counsel for the Minister intervened in the hearing due to concerns that the PA committed child abduction contrary to Article 1F(b) of the United Nations *Convention Relating to the Status of Refugees*

[*Refugee Convention*]. If the Applicant had abducted the Minor Applicants she would be excluded from making a refugee claim pursuant to Article 1F(b) of the *Refugee Convention* [the Article 1F(b) Exclusion]. The Minister also raised concerns about the PA's identity, credibility, and state protection.

### III. The Decision

[10] The RPD refused the Applicants' refugee claim because (1) the PA lacked credibility; (2) the PA lacked an objective basis for her subjective fear; and (3) the US would protect the Minor Applicants if needed since they are US citizens. Before assessing the merits of the Applicants' claims, the RPD considered the Applicants' identity and the Article 1F(b) Exclusion.

#### (1) Identity

[11] To establish her identity, the PA provided an extract of birth in The Gambia, from 1994 [Birth Extract]; a Republic of The Gambia National ID card [National ID card]; and a BSIC The Gambia Ltd ID card [Work ID]. The Minister seized the PA's Birth Extract and National ID card and the CBSA Document Analysis Unit found that they were inconclusive for identity. The RPD assigned little weight to the Birth Extract because it was not a Birth Attestation, it was vague, and uncertain in terms of who issued it. The RPD also assigned no weight to the National ID card because the PA did not provide the identity documents she would have needed to obtain it in the first place. Furthermore, the RPD noted that this document referenced a different date of birth and father when compared to her past US visa applications.

[12] The RPD found that the PA's past US visa applications and the accompanying biometric data indicated that the PA's birthdate is April 4, 1989 (not 1994) and that her step-father is Mustafa Drammeh [Mustafa] (not Abubacarr). The US visa applications were submitted with a passport that similarly indicates that the PA's birthdate is April 4, 1989. The RPD concluded that this evidence demonstrates that she is Haja Drammeh, a citizen of The Gambia, and that she is now 31 years old. The RPD rejected the PA's explanation that she misrepresented her age on her passport and visa applications because her parents told her to. The RPD drew a negative credibility finding due to the inconsistencies regarding her age.

[13] The PA also provided her sister's affidavit confirming that the PA is her sister, with whom she grew up. The RPD gave full weight to this letter but disallowed questioning of the sister because the PA had not made the request in a timely manner and the RPD did not allot additional time to question her.

[14] Finally, the RPD confirmed the Minor Applicants' US identity and their US citizenship.

(2) Article 1F(b) Exclusion

[15] The RPD concluded that the PA did not commit child abduction because the Minor Applicant's father signed a letter consenting to their travel. Furthermore, the RPD noted the PA's testimony that the Minor Applicants had spoken to their father the day before the hearing and that he knew they were making a refugee claim in Canada. The RPD found that the PA was not excluded under Article 1F(b) of the *Refugee Convention*. The Respondent does not contest this finding.

(3) Merits of the PA's Claim

(a) *Credibility*

[16] The RPD found the following inconsistencies, contradictions, and omissions in the PA's evidence and concluded that she was not a credible witness:

- 1) In her basis of claim [BOC] form, the PA failed to list all of her siblings and her step-father, Mustafa. On her past visa applications, she identified Mustafa as her step-father and listed three additional siblings, whom she confirmed were her siblings on cross-examination at the RPD. The PA also failed to disclose that her mother has been a permanent resident in the US since 2010;
- 2) The PA failed to disclose that her mother travelled to the US and Canada in 2016 and 2019, respectively. The PA also omitted that her mother allegedly threatened her life when she was visiting the PA's sister in Canada;
- 3) The PA stated that her mother would physically examine her to see if she was still a virgin and that her future husband was paying for her education and well-being in The Gambia. The RPD found it implausible that the PA's parents would lie about her age to enable her travel to the US as a minor; and
- 4) The PA failed to mention in her BOC form that she consulted with a lawyer within her first year of being in the US.

(b) *Subjective Fear*

[17] Having found the PA not credible, the RPD disbelieved the PA's claim that she hired a lawyer during her first year in the US. Accordingly, the RPD found that the PA lacked subjective fear because she did not seek help in the US as soon as she could. The RPD noted that the PA speaks English and could have used the internet to find out how to get help in the US, but she did not.

(4) Merits of the Minor Applicants' Claim

[18] The RPD held that the Minor Applicants do not face a risk under section 96 or 97 of the *IRPA* if returned to the US.

IV. Issues

[19] The sole issue is whether the RPD's Decision was unreasonable. The relevant sub-issues are:

1. Was the RPD's credibility analysis unreasonable?
2. Was the RPD's subjective fear analysis unreasonable?

V. Standard of Review

[20] I agree with the parties that the appropriate standard of review is reasonableness. This case does not engage one of the exceptions set out in *Canada (MCI) v Vavilov*, 2019 SCC 65 [Vavilov]. Therefore, the presumption of reasonableness applies (*Vavilov* at paras 23-25, 53).

[21] A reasonableness review requires the Court to examine the decision for intelligibility, transparency, and justification. The reviewing court must look to both the outcome of the decision and the justification of the result (*Vavilov* at para 87). A reasonable decision must be “justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov* at para 99). However, a reviewing court must refrain from reweighing and reassessing the evidence considered by the decision-maker (*Vavilov* at para 125). If the reasons of the decision-maker allow a reviewing Court to understand why the decision was made, and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law, the decision will be reasonable (*Vavilov* at paras 85-86).

VI. Parties’ Positions

A. *Was the RPD’s credibility analysis unreasonable?*

(1) Applicant’s Position

[22] The RPD’s credibility findings were unreasonable because they were based on omissions within the BOC form and internal inconsistencies in the PA’s testimony that were peripheral to the heart of her claim (*Lubana v Canada (MCI)*, 2003 FCT 116 at para 11 [*Lubana*]). Failure to



question the PA about her core fears further renders the Decision unreasonable because it indicates that the evidentiary record was not taken into account (*Vavilov* at para 126).

[23] The RPD did not consider the PA's explanations for the various "inconsistencies, contradictions, and omissions", summarized above at paragraph 16. At the hearing, the PA explained that she only has two biological siblings and that the additional siblings listed on her past visa applications are her cousins. The PA explained that in her Tribe it is common to refer to your cousins as your brothers and sisters, particularly if they live in the same house as you. She did not list her cousins on her BOC form because she was told to only list her biological siblings. Likewise, the PA explained that Mustafa was her uncle – not her stepfather – and that he was only listed as her father on her visa applications because he was going to travel with her in the US to monitor her. The RPD never considered this explanation nor did the RPD put this issue to the PA during the hearing. Finally, the RPD made an adverse credibility finding because the PA omitted to mention her mother's visits to the US and Canada. The RPD failed to consider the PA's explanation that she did not see her mother during those visits.

[24] The Decision is also unreasonable because the RPD raised concerns that the PA's sister's affidavit did not mention the mother's visit to Canada or the mother's alleged threat against the PA during that visit. Yet, the RPD refused to call the PA's sister as a witness at the hearing (*Oria-Arebun v Canada (Citizenship and Immigration)*, 2019 FC 1457 at para 52).

[25] Finally, the RPD found it implausible that the PA's parents would enable her travel to the US. This finding was unreasonable because it was made without regard for the PA's testimony

that she would be travelling with her uncle, Mustafa, who would monitor her. Similarly, the RPD failed to consider the PA's explanation that her parents and Abdoulie supported her travel because, culturally, it provides a sense of pride when your daughter or future wife travels to the US. These explanations are not "outside the realm of what could reasonably be expected" (*Chen v Canada (MCI)*, 2015 FC 225 at para 14 [*Chen*]). It is incumbent on a decision-maker to consider cultural differences when making implausibility findings (*Chen* at para 15).

## (2) Respondent's Position

[26] The RPD made reasonable adverse credibility findings that were central to the Applicants' claims. First, the RPD reasonably drew negative inferences about the PA's age due to discrepancies in her identity documents. The PA's Birth Extract and National ID were the only primary identity documents she provided, which bore a 1994 birthdate. The RPD found these documents to be inconclusive for identity. In comparison, the RPD found that the biometric data from the US confirmed her identity. Those documents, including a copy of her passport, all had a 1989 birthdate. It was open to the RPD to reject the PA's explanation that the 1989 birthdate reflected her parent's wishes, as this was internally inconsistent with the rest of her BOC narrative.

[27] The RPD made a reasonable implausibility finding that Abdoulie and her parents would not allow her to travel to the US. The RPD has discretion to make credibility findings based on implausibility, common sense, rationality, and inherent logic and reject evidence that does not accord with the probabilities affecting the case as a whole (*Perjaku v Canada (MCI)*, 2007 FC 496 at para 2; *Moualek v Canada (MCI)*, 2009 FC 539 at para 1; *Lawani v Canada (MCI)*, 2018

FC 924 at paras 24-26, 37 [*Lawani*]). The RPD identified the evidence it was basing its implausibility finding on (i.e., that they wished for her to remain a virgin).

[28] Additionally, the RPD reasonably made adverse credibility findings because the PA omitted information about her siblings; her step-father, Mustafa; and her mother's past visits to Canada and the US. The PA's explanation that she omitted her siblings and Mustafa due to cultural differences has no merit. The PA was represented by counsel and ought to have known that she had to provide complete and updated information in her BOC form (*Qi v Canada (MCI)*, 2020 FC 400 at para 3). The RPD reasonably drew a negative inference about the PA's failure to mention that her mother allegedly threatened her. It was also open to the RPD to conclude that the PA's explanation that she did not think it was relevant was not satisfactory. Where an omitted incident is significant to a claim, the omission will impugn the applicant's credibility (*Ogaulu v Canada (MCI)*, 2019 FC 547 at paras 18-19; *Talanov v Canada (MCI)*, 2020 FC 484 at paras 60-62).

[29] Finally, the RPD reasonably refused to question the PA's sister, as the Applicants had not complied with section 44 of the RPD Rules (*Olaya Yauce v Canada (MCI)*, 2018 FC 784 at para 26 [*Olaya Yauce*]).

B. *Was the RPD's subjective fear analysis unreasonable?*

(1) Applicant's Position

[30] The RPD erred in concluding that the Applicants' failure to claim refugee status in the US demonstrated a lack of subjective fear. The PA explained that she first sought a lawyer in the US in June 2013 but that he did not provide any legal services. She then explained that she sought another lawyer but by the time she could afford the consultation, she had been in the US for over a year and was advised she could not make a refugee claim. The RPD failed to account for this explanation simply because her interactions with the first lawyer were not detailed in her BOC narrative. At the RPD hearing, the PA elaborated on her other attempts to seek help while in the US. The most significant aspect of the PA's narrative – that she consulted with the second lawyer – was included and this is evidence of her subjective fear.

[31] Second, the RPD erred by focusing its subjective fear assessment solely on the Applicant's failure to claim refugee status in the US. Failure to make a claim in another country is only a contributing factor in assessing subjective fear but it is not determinative (*Wangchuck v Canada (MCI)*, 2016 FC 160 at para 18 [*Wangchuck*]). The RPD should have also considered her fears related to returning to The Gambia.

[32] Finally, the Decision is unreasonable because subjective fear is not determinative when an applicant is found to be credible on core elements of a claim. Where a decision-maker's credibility and subjective fear findings are successfully challenged, the entire decision will be unreasonable (*Williams v Canada (MCI)*, 2016 FC 161 [*Williams*]).

[33] Finally, the Applicants also note that the RPD stated that state protection was a determinative issue. However, the RPD did not analyze state protection in The Gambia.

(2) Respondent's Position

[34] The RPD reasonably assessed the PA's subjective fear. The RPD noted that the PA lived in the US for about four years, spoke English, and had basic research skills, but never made a refugee claim in the US. It is reasonable to expect that the PA's BOC form would detail meeting with a lawyer within the first year of being in the US. Therefore, it was reasonable for the RPD to conclude that this was an inconsistency and omission, particularly given that the PA had two years to review and amend her narrative.

[35] Finally, the RPD was not required to assess state protection in The Gambia because it did not find the PA credible. The RPD reasonably assessed state protection for the Minor Applicants in the US.

VII. Analysis

A. *Was the RPD's credibility analysis unreasonable?*

[36] In *Lawani*, Justice Gascon summarized the principles governing credibility assessments of refugee claimants. He underscored "the well-accepted statement that the RPD is best positioned to assess an applicant's credibility, as it has the benefit of hearing [a claimant's] testimony" (at para 22). He also emphasized:

[23] ...the RPD cannot base a negative credibility finding on minor contradictions that are secondary or peripheral to the refugee protection claim. The decision-maker must not conduct a too granular or overzealous analysis of the evidence. In other words, not all inconsistencies or implausibilities will support a negative finding of credibility; such findings should not be based on a

“microscopic” examination of issues irrelevant to the case or peripheral to the claim (*Attakora v Canada (Minister of Employment and Immigration)* (1989), 99 NR 168 (FCA) at para 9; *Cooper v Canada (Citizenship and Immigration)*, 2012 FC 118 [Cooper] at para 4).

[Emphasis added.]

[37] In my view, only some of the RPD’s credibility findings were peripheral to the heart of the Applicants’ refugee claim. In particular, the PA’s omission that her mother is a permanent resident of the US and that her relative paid off airport officials are peripheral. However, almost all of the RPD’s negative credibility findings were relevant to the Applicants’ claim. The makeup of the PA’s family is central to her claim because they are the alleged agents of persecution. Furthermore, the mother’s alleged threats against the PA (which flow directly from her trip to Canada in 2019) are central as they evidence the risk the PA faces in The Gambia. Likewise, consulting with a lawyer within the first year of being in the US is relevant to the PA’s claim since it helps demonstrate subjective fear. Finally, the implausibility finding that the PA’s parents would not allow her to go to the US is premised on the PA’s claim that her parents wanted her to remain a virgin and marry Abdoulie.

[38] Although most of the RPD’s credibility findings are not peripheral, I ultimately find that the Decision is unreasonable because the RPD failed to engage with the explanations offered by the PA. For a decision to be reasonable, it is not enough that the outcome be justifiable. Where reasons are required, those reasons must also justify the decision (*Vavilov* at para 86). The reasons must communicate to the persons affected why the decision was made (*Vavilov* at paras 95-96). Additionally, a decision-maker must engage with the evidence before it (*Vavilov* at paras

125-126). The RPD never acknowledges or explains why it rejects the following explanations, which were sworn statements, offered by the PA:

- The PA's parents and Abdoulie permitted her visa applications because, culturally, it provides a sense of pride for a daughter/future wife to travel to the US;
- The PA's parents and Abdoulie allowed the PA to apply for US visas because the PA would travel with and be monitored by a male figure, her uncle, Mustafa;
- The PA's Canadian refugee claim only included her biological siblings. The PA listed her cousins as her 'siblings' in her past US visa applications because her parents told her to and because it is common to refer to cousins as your siblings in The Gambia, particularly if they live together; and
- The PA did not include her mother's visit to Canada or the US because she never saw her mother during her trips.

[39] While the presumption of truthfulness may be rebutted where the decision-maker is unsatisfied with a claimant's explanations (*Lawani* at para 21), the decision-maker must still grapple with those explanations and explain why they are unsatisfactory. Indeed, "[t]he RPD's conclusions and inferences on a claimant's credibility must always remain reasonable and the analysis must be formulated in 'clear and unmistakable terms'" (*Lawani* at para 26 citing *Hilo v Canada (Minister of Employment & Immigration)*, [1991] FCJ No 228 (FCA) at para 6, 130 NR 236). Likewise, a decision-maker cannot ignore explanations with respect to apparent contradictions (*Owusu-Ansah v Canada (Minister of Employment & Immigration)*, [1989] FCJ No 442 (FCA), 98 NR 312). Here, the Court is left wondering why the RPD rejected the PA's explanations.

[40] I also find that the RPD erred in making its implausibility finding that the PA's parents and Abdoulie would not permit her to travel to the US. In particular, had the RPD considered the PA's explanation that Mustafa would be monitoring her, it may not have found their consent to be "outside the realm of what could reasonably be expected" (*Chen* at para 14).

[41] As a final note, it was reasonable for the RPD to refuse to call the PA's sister as a witness. The RPD assigned full weight to the sister's affidavit. If the Applicants wished to rely on her testimony to establish anything beyond the affidavit, they should have complied with the RPD rules (*Olaya Yauce* at paras 26-27).

B. *Was the RPD's subjective fear analysis unreasonable?*

[42] The RPD's subjective fear analysis was unreasonable. The Applicants made three arguments about subjective fear: (1) a decision-maker's subjective fear analysis will be unreasonable when it is sufficiently tied to adverse credibility findings that are successfully challenged; (2) the PA's efforts in seeking out the second lawyer is enough to establish subjective fear; and (3) it was an error to assess subjective fear solely on the PA's failure to claim refugee status in the US.

[43] When a decision-maker makes several adverse credibility findings, they may assess those negative findings cumulatively and reject a refugee claimant's story (*Lawani* at para 22 citing *Sary v Canada (MCI)*, 2016 FC 178 at para 19; *Quintero Cienfuegos v Canada (MCI)*, 2009 FC 1262 at para 1). Here, the RPD made a series of adverse credibility findings that were unreasonable because they were not justified in light of the PA's explanations as stated above. In



relation to the PA's subjective fear, the RPD drew a distinct adverse credibility finding because the PA failed to explain in her BOC form that she consulted with two lawyers while in the US.

The RPD wrote:

[57] ...She was read her BOC narrative and asked why she failed to mention that she had paid a lawyer a \$1000, who disappeared, mentioning only the visit to the second lawyer, who had advised that she had passed the one year delay to make a claim. She replied that it was described in another claim form when she arrived here to Canada, but she didn't know where that was right now. The claimant has had two years to review and make amendments to her narrative. She has had at least two lawyers, and this has not been amended. I consider this an inconsistency and an omission for which I draw a negative inference.

[58] I should add that if the claimant was as desperate as she alleges to be free of her cultural and traditional bonds, and fearful to have to return forcibly, she would have done whatever she could to find a way to seek help in the United States, while she was there as soon as she could. She also had the assistance of family members.

[59] The claimant speaks English, and has a basic education, she has the skills to search on the internet, an open source information at any public computer, how to find help in the USA.

[60] In summary, I found that the claimant was not credible, regarding her failure to claim in the United States, where she lived from 2013 to 2017.

[Emphasis added.]

[44] With this passage in mind, I agree with the Respondent that this case is unlike *Williams*, because there is no “‘cumulative findings’ language” within the Decision (at para 42). In *Williams*, Justice Southcott was unable to divorce the Refugee Appeal Division's adverse credibility findings from its subjective fear analysis. In comparison, the above excerpt indicates that even if the RPD had taken the PA's explanations about other omissions, contradictions, and inconsistencies into account, the RPD's decision regarding subjective fear would not have

changed. Therefore, I disagree with the Applicants that the RPD's subjective fear analysis was unreasonable because it was tied to unreasonable adverse credibility findings.

[45] Turning to the Applicants' second argument, I agree with the Respondent that seeking a lawyer within the PA's first year in the US goes directly to the PA's subjective fear, as it demonstrates that she was scared and needed help. I disagree with the Applicant that consulting the second lawyer is somehow more significant. While the second consultation explains why the PA was unable to make a refugee claim in the US, reaching out to the first lawyer is arguably more significant in establishing the PA's subjective fear. When asked why she did not include this information, the PA said that she thought she had included it in another claim form when she arrived in Canada. The RPD noted this explanation and it was open to the RPD to conclude that it was not adequate. The RPD further noted that the PA had competent counsel and years to change her BOC narrative to include this very important detail. The onus is on a refugee claimant to include all relevant information in their claim. A refugee claimant's failure to include important information in their BOC form can lead to an adverse credibility finding (*Zeferino v Canada (MCI)*, 2011 FC 456 at para 31; *Berhani v Canada (MCI)*, 2021 FC 1007 at para 42).

[46] Notwithstanding my findings above, the Applicants' third argument prevails. Having found the RPD's other adverse credibility findings unreasonable, all the RPD is left with is one reasonable adverse credibility finding based on a single omission (that the PA consulted a lawyer within her first year of being the US). Contrary to the Respondent's submissions, I find that this puts the case on similar footing to *Wangchuck*. While a claimant's failure to claim refugee status in the US can be a contributing factor when assessing subjective fear, on its own, it is not enough

to establish that the PA lacked subjective fear entirely (*Wangchuck* at paras 38-39. See also *Angel Gonzalez v Canada (MCI)*, 2010 FC 1292 at paras 13-14). The RPD erred by assessing the Applicants' subjective fear solely on their failure to make a refugee claim in the US. I agree with the Applicants that the RPD should have assessed the PA's subjective fear in relation to being removed to The Gambia and being forced to marry Abdoulie.

VIII. Conclusion

[47] The application for judicial review is allowed. There is no question for certification.

**JUDGMENT in IMM-3245-20**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is allowed. The matter is remitted to a different member of the RPD for re-determination.
2. There is no question for certification.
3. There is no order as to costs.

"Paul Favel"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-3245-20

**STYLE OF CAUSE:** HAJA DRAMMEH, MOHAMMED GIKINEH,  
AMINATA GIKINEH v THE MINISTER OF  
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**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** DECEMBER 2, 2021

**JUDGMENT AND REASONS:** FAVEL J.

**DATED:** MAY 6, 2022

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