

Federal Court



Cour fédérale

Date: 20180115

Docket: IMM-798-17

Citation: 2018 FC 34

Toronto, Ontario, January 15, 2018

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

HABAB AHMED HASSAN ABUZEID

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

and

ABDALLA ABOSHARIA

Intervener

JUDGMENT AND REASONS

I. Overview

[1] Ms. Abuzeid seeks judicial review of a Refugee Appeal Division [RAD] decision confirming a Refugee Protection Division [RPD] determination that she was neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act, SC 2001, c 27* [IRPA].

[2] Before the RAD, Ms. Abuzeid alleged that she had been denied natural justice and a fair hearing before the RPD due to the incompetent assistance of her counsel. The RAD concluded that insufficient evidence had been placed before it to establish incompetent representation and dismissed the appeal. Ms. Abuzeid submits that in dismissing the appeal: (1) the RAD's analysis and conclusions relating to the incompetence allegation were unreasonable; and (2) the RAD unreasonably rejected the new evidence that was not placed before the RPD due to her counsel's incompetence.

[3] The party alleging incompetent assistance bears the onus of establishing both the incompetent performance of counsel and prejudice flowing from that incompetence. The threshold is high and Ms. Abuzeid has not met it. The application is denied.

II. Background

[4] Ms. Abuzeid is a citizen of Sudan. She is married and has four children, all of whom remain in Sudan. She came to Canada unaccompanied in May 2016 and made a refugee claim shortly thereafter.

[5] The refugee claim was based on a stated fear of Sudanese security forces resulting from anti-government political work. Ms. Abuzeid claims to have been arrested on numerous occasions, beaten, sexually assaulted and threatened with rape.

[6] Ms. Abuzeid reported that she was most recently detained by Sudanese authorities in January 2016 and upon being released she applied for a passport, which she received in February 2016. She subsequently obtained two exit visas from the Sudanese government: first to travel to Egypt, and then to travel to Canada.

[7] Ms. Abuzeid's claim was heard by the RPD where she was represented by Mr. Abosharia. The Minister of Citizenship and Immigration intervened before the RPD on credibility grounds. The RPD denied the claim, credibility being the determinative issue.

[8] Ms. Abuzeid then retained new counsel and pursued an appeal before the RAD. She sought to place new evidence before the RAD and submitted a complaint to the Law Society of Upper Canada [LSUC] and Legal Aid Ontario alleging that Mr. Abosharia incompetently represented her in the pursuit of her refugee claim. The complaints remain outstanding.

[9] In an Order dated May 2, 2017 Prothonotary Kevin Aalto noted the sole issue on the Notice of Application for Leave and Judicial Review is the allegation of incompetent assistance of counsel and granted Mr. Abosharia leave to intervene and file an Intervener's record.

III. Standard of Review

[10] RAD decisions, including the assessment of admissibility of new or fresh evidence are to be reviewed against a standard of reasonableness (*Khan v Canada (Citizenship and Immigration)*, 2016 FC 855 at para 27). Breaches of procedural fairness resulting from counsel's incompetence attract a correctness standard of review (*Badihi v Canada (Citizenship and Immigration)*, 2017 FC 64 at para 7).

[11] In this case the Court is reviewing a finding of the RAD on the question of counsel competence, not dealing with the issue *de novo*. Ms. Abuzeid does not allege that the RAD acted unfairly or that there was a breach of fairness or natural justice in the proceedings before the RAD. Counsel for the parties were asked for their views on the standard of review in these circumstances. In written submissions counsel for Ms. Abuzeid has submitted that "the matter at issue in this Judicial review Application is reasonableness of the RAD's decision, not the Intervener's incompetence *per se*." In oral submissions there was some acknowledgment that it was unclear as to whether the Court should be applying a correctness or reasonableness standard in the circumstances.

[12] Based on the facts and circumstances before me, I concur with the view advanced in the written submissions of Ms. Abuzeid's counsel. The Court is being asked to review a decision of the RAD where the RAD, in the exercise of its jurisdiction and authority, concluded there was "insufficient evidence to find that counsel's representation in regard to this claim was incompetent and as a result the claim was denied." In my view, this determination was one of

mixed fact and law and is to be reviewed against a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 51, 53; *Smith v Alliance Pipeline Ltd*, 2011 SCC 7 at para 26).

However, my view as to the standard of review is of little consequence. I am of the opinion that the RAD determination was both reasonable and correct as Ms. Abuzeid has failed to establish that the outcome of her claim would have been different but for any incompetence on the part of her counsel before the RPD.

IV. Preliminary Matters

A. *Style of Cause*

[13] The applicant has named the Minister of Immigration, Refugees and Citizenship Canada as the respondent in this matter. The correct respondent is the Minister of Citizenship and Immigration (*Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, s 5(2) and IRPA). Accordingly, the respondent in the style of cause is amended to the Minister of Citizenship and Immigration.

B. *Intervener's Record*

[14] Mr. Abosharia filed a lengthy intervener's record in this matter. Ms. Abuzeid takes issue with the record on the grounds that much of it advances arguments relating to the merits of the RAD decision. Ms. Abuzeid relies on the Chief Justice's March 7, 2014 *Protocol Re Allegations Against Counsel or Other Authorized Representatives in Citizenship, Immigration and Protected Person Cases before the Federal Court* which provides that former counsel's written representations should be for the purpose of responding to the allegations.

[15] The intervener's role in this case is not to defend or advocate in favour of the RAD decision. Rather, intervener status has been granted to allow Mr. Abosharia to respond to the allegations of incompetent representation. It would have been preferable had those representations been made before the RAD. In this respect the record does not indicate why representations were not made although the record does indicate Mr. Abosharia was advised by way of letter sent by courier on January 3, 2017 that his allegedly incompetent assistance was raised before the RAD and a decision then issued on January 23, 2017.

[16] In the circumstances I have reviewed and considered the Intervener's record but in doing so have not relied upon the arguments advanced in support of the merits of the RAD decision.

C. *Ms. Abuzeid's August 22, 2017 Affidavit*

[17] Mr. Abosharia takes issue with Exhibit A to the August 22, 2017 affidavit of Ms. Abuzeid, a letter from Ms. Sarah Snider. Mr. Abosharia submits that the letter is unsworn, undated, addresses an issue that is in dispute, and is improperly proffered for the truth of its contents. He argues that the inclusion of this information in the August 22, 2017 affidavit is contrary to both the jurisprudence and Rule 81 of the *Federal Court Rules*, SOR/98-106. He further submits that Ms. Snider's failure to swear an affidavit has deprived him of the opportunity to test the evidence. I agree. The contents of Exhibit A to the August 22, 2017 affidavit have not been considered.

V. Analysis

A. *Incompetent Representation*

[18] Ms. Abuzeid identified a list of errors and omissions on the part of Mr. Abosharia before the RAD. She submits that her credibility was impugned before the RPD due to the absence of key evidence which Mr. Abosharia failed to advise her to provide. For example, she states the RPD found it implausible that she was able to apply for and receive a passport and exit visas after having been arrested and detained by Sudanese authorities. This, she argues, was a primary concern for the RPD and arose because Mr. Abosharia failed to advise her to include a letter from her cousin, a Sudanese Immigration and Passport official, explaining how he had secretly obtained travel documents for her.

[19] Ms. Abuzeid also acknowledged in her submissions that none of the identified deficiencies in Mr. Abosharia's conduct independently rise to the level of incompetence. However, she submits that the deficiencies cumulatively resulted in the RPD finding her not to be credible and rejecting her refugee claim. She argues that the RAD failed to address the cumulative effect of the deficiencies and ignored jurisprudence finding incompetent representation where counsel: (1) prepares refugee forms in a careless fashion and without sufficient detail; (2) fails to provide evidence to the RPD when a client has provided that evidence to counsel; (3) fails to canvass the availability of evidence, even where the client does not volunteer it, that might exist to support a claim; and (4) fails to sufficiently prepare their client for a hearing.

[20] Ms. Abuzeid further argues that since Mr. Abosharia did not respond to her allegations before the RAD the uncontradicted evidence was that she had been incompetently represented.

[21] In *Badihi v Canada (Citizenship and Immigration)*, 2017 FC 64 I discuss the test to be applied where incompetent assistance of counsel is alleged:

[17] Justice James Russell set out the test for addressing allegations of ineffective or incompetent assistance of counsel in *Galyas*, where he stated at paragraph 84:

[84] It is generally recognized that if an applicant wishes to establish a breach of fairness on this ground, he or she must:

- a. Provide corroboration by giving notice to former counsel and providing them with an opportunity to respond;
- b. Establish that former counsel's act or omission constituted incompetence without the benefit and wisdom of hindsight; and
- c. Establish that the outcome would have been different but for the incompetence. [Sources omitted]

[18] The burden is on the applicants to establish the performance and the prejudice components of the test to demonstrate a breach of procedural fairness. The parties agree that the threshold is very high. As noted by Justice Richard Mosley in *Jeffrey v Canada (Minister of Citizenship and Immigration)*, 2006 FC 605 at paragraph 9:

[9] [...] The party making the allegation of incompetence must show substantial prejudice to the individual and that prejudice must flow from the actions or inaction of the incompetent counsel. It must be shown that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would be different."

[19] The Supreme Court of Canada has stated the following in *R. v G.D.B.*, 2000 SCC 22 at paragraph 29:

[29] In those cases where it is apparent that no prejudice has occurred, it will usually be undesirable for appellate courts to consider the performance component of the analysis. The object of an ineffectiveness claim is not to grade counsel's performance or professional conduct. The latter is left to the profession's self-governing body. If it is appropriate to dispose of an ineffectiveness claim on the ground of no prejudice having occurred, that is the course to follow (*Strickland v Washington*, 466 U.S. 668 (1984)) at p. 697).

[22] The RAD did not expressly set out the incompetence test, although it did consider and address both the performance and prejudice components. As noted by my colleague Justice Alan Diner, where incompetent representation is alleged it is not the role of the Court to take the place of a professional regulator but rather to "determine whether the omissions resulted in prejudice to the Applicant and without which would have, on the basis of reasonable probability, resulted in a different outcome" (*Gaudron v Canada (Citizenship and Immigration)* 2014 FC 1092 at para 9 [*Gaudron*]). In my opinion the RAD's role is similar to that of the Court.

[23] The RAD addressed each of the alleged acts of incompetence, concluding that the alleged incompetence did not relieve Ms. Abuzeid of her obligation to provide truthful, complete and correct information. The RAD: (1) found that Ms. Abuzeid knew the topic of her exit visas was of concern to the RPD and that she likely knew the significance to her claim of raids on her home; and (2) rejected the notion that she would not have known that evidence to corroborate her claimed political activism, arrests, and detentions would be desirable. Consequently the blame for failure to produce sufficient evidence on these topics rested at least partially with her.

[24] In short the RAD effectively concluded that Ms. Abuzeid bore a measure of responsibility for the failings in her evidence which could not be attributed to counsel incompetence. She did not produce documentary evidence that was reasonably available to her, and allegedly incompetent representation, if any, did not absolve her of her responsibility to do so.

[25] In reaching this conclusion the RAD did not in my view ignore the cumulative effect of the alleged deficiencies. Rather in considering the decision as a whole I am satisfied that the RAD found Ms. Abuzeid had failed to demonstrate the prejudice component of the incompetent representation test.

[26] I am further of the view that the RAD's conclusion was not inconsistent with the jurisprudence of this Court. In *Gaudron* for example, Justice Diner states that a legal representative's responsibility includes making reasonable attempts to seek out crucial information. However a review of that decision indicates that the underlying circumstances were clearly reported to counsel, that some of the relevant evidence was in counsel's possession but not relied upon and other evidence was evidently available but not sought. The circumstances here are not nearly so clear.

[27] Ms. Abuzeid concedes that the central credibility finding in her claim was the RPD finding that it was not plausible she would be issued a passport and exit visas if she was truly a political activist in Sudan who had been recently arrested and detained. She contends that but for her counsel's bad advice this negative credibility finding would not have been made. This

argument is simply not compelling. Even with the benefit of the RPD's reasons and several additional months to prepare her RAD appeal, the best evidence she produced on this issue was a letter from her cousin, which the RAD found lacking in credibility: the RAD found the letter to be inconsistent with Ms. Abuzeid's oral evidence, and that it was "not a sworn statement and its source cannot be known with full confidence."

[28] It was not unreasonable for the RAD to have preferred the Minister's documentation concerning the Sudanese government's efforts to seize passports and deny visas to political activists. Nor was it unreasonable for the RAD to conclude that the outcome would not have been different had the cousin's letter been placed before the RPD.

[29] Having considered the record as a whole, including those portions of the intervener's record responding to the allegations of incompetence, I am similarly of the opinion that Ms. Abuzeid has failed to demonstrate the extraordinary circumstances required to establish a breach of natural justice on the basis of incompetent representation (*Memari v Canada (Citizenship and Immigration)*, 2010 FC 1196 at para 36). The evidence simply does not demonstrate that but for the alleged incompetent conduct, the outcome before the RPD would have been different. In reaching this conclusion I make no finding on alleged acts of incompetence. The alleged incompetence is a matter best dealt with by Mr. Abosharia's professional regulator the LSUC.

B. *Admission of New Evidence*

[30] Ms. Abuzeid's submissions in respect of the refusal to admit her proposed new evidence are linked to her position that the incompetent representation analysis was unreasonable: the

“RAD unreasonably analyzed the Applicant’s allegations of incompetence of Counsel and therefore unreasonably refused to admit any of the new evidence.”

[31] My conclusion that the incompetence analysis was not unreasonable is a full answer to the submissions made on the proposed new evidence. However, I would also note that the RAD examined all of the evidence for admissibility in light of the requirements of IRPA section 110(4) and the decision of the Federal Court of Appeal in *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96.

[32] In addition to rejecting the incompetent counsel claim, the RAD found that every piece of new evidence was either irrelevant, not credible, or failed to meet the section 110(4) criteria. The RAD’s conclusions in this regard have not been challenged.

[33] The RAD did not err in its treatment of the proposed fresh evidence.

VI. Conclusion

[34] The RAD’s decision reflects the elements of transparency, intelligibility and justifiability in the decision-making process and the outcome is within the range of reasonable, possible outcomes based on the facts and the law. The application is dismissed.

[35] In written submissions the Intervener has sought costs. Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, provides that costs are not

awarded or payable unless the Court, for special reasons, so orders. The Intervener has not identified any special reasons that would justify an order of costs and as such none are awarded.

[36] The parties have not identified a question of general importance for certification and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.
2. No question is certified.
3. The style of cause is amended to the Minister of Citizenship and Immigration as the respondent.
4. No costs are awarded.

"Patrick Gleeson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-798-17

STYLE OF CAUSE: HABAB AHMED HASSAN ABUZEID v THE
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PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 23, 2017

JUDGMENT AND REASONS: GLEESON J.

DATED: JANUARY 15, 2018

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