Federal Court  Cour fédérale

Date: 20181003

Docket: IMM-4270-17

Citation: 2018 FC 975

Ottawa, Ontario, October 3, 2018

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

BILIKISU OLAYOMIBO OLAYINKA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

PIUS LEKWUWA OKORONKWO

Intervener

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of the decision of the Refugee Appeal Division [RAD] dated September 14, 2017 [the Decision or RAD Decision] to dismiss the Applicant's appeal of the negative decision of the Refugee Protection Division [RPD] dated April 5, 2017.

[2] As explained in greater detail below, this application is dismissed, because the Applicant has not demonstrated that she was deprived of natural justice, by the representation by her former counsel before the RPD or the RAD, or that the RAD erred in assessing the evidence or the Applicant's credibility and identity.

II. **Background**

[3] The Applicant states that she is Nigerian and that her name is Bilikisu Olayomibo Olayinka. She claimed refugee protection in Canada based on fear of her husband, who she alleges was abusive. In support of her claim, Ms. Olayinka submitted an Attestation of Birth, an accompanying Declaration of Age, school certificates, a Certificate of Origin, affidavits from relatives, friends and neighbours, medical reports, and materials relating to the circumstances of the death of her first child.

[4] The Applicant's claim was refused by the RPD on the basis that she had not met the onus upon her to establish her identity. She appealed to the RAD, but that appeal was dismissed in the Decision summarized below, which is the subject of this application for judicial review. The Applicant also sought new counsel and requested that the RAD reopen its decision, alleging incompetence of her former counsel. That request was refused by the RAD in a decision dated January 25, 2018, which is the subject of a separate application for judicial in Court file IMM-622-18. Both applications for judicial review were heard on July 25, 2018. The Court is issuing a separate decision in IMM-622-18.

[5] The arguments raised by the Applicant in challenging the Decision in the present matter include the allegations of incompetence by her former counsel, based on which she argues she has been deprived of natural justice. Because of those allegations, the Applicant's former counsel, Pius Lekwuwa Okoronkwo, was granted Intervener status in this matter by Order of Prothonotary Milczynski dated May 10, 2018. While that Order did not expressly add Mr. Okoronkwo to the style of cause, this was discussed at the hearing, and I confirmed that my Judgment would effect such addition.

III. **Decision of Refugee Appeal Division**

[6] The RAD dismissed the appeal and confirmed the earlier decision of the RPD, finding that the Applicant is neither a Convention refugee nor a person in need of protection. Like the RPD, the RAD made this determination on the basis that the Applicant had failed to establish her identity.

[7] The RAD first considered the Applicant's failure to produce the fraudulent passport she used to travel to Canada and her testimony regarding that document. The Applicant stated that the agent who assisted her kept the documents he used with him, that she only handled the passport briefly when she arrived in Canada, and that the agent took it from her once she was processed by Canadian authorities. The RAD drew a negative inference from the Applicant's inability to produce documentation to support her entry into Canada and from what it considered to be inconsistent testimony with respect to the passport she used to come to Canada. The RAD also found it not credible that the Applicant would have, as she alleged, received no instructions from her agent as to how to respond to questions by customs officials.

[8] Next, the RAD considered the Applicant's failure to provide a current, valid Nigerian passport. The RAD agreed in part with her submission that it was unreasonable for the RPD to expect her to apply for a Nigerian passport at the Nigerian Embassy in Ottawa, because such a step could be considered re-availment to her country of nationality. However, the RAD nevertheless drew a negative inference from the Applicant's failure to obtain a Nigerian passport, given that the RPD had rejected her claim based on her failure to establish her identity.

[9] The RAD found that the Declaration of Age and Attestation of Birth were fraudulent because the Attestation of Birth was signed by a person with the same name as the Applicant's father, but her father had died more than 10 years ago. The Applicant claimed that it was her uncle who had signed the document, that her uncle had assumed the role of her father after his brother's death, and that her uncle had the same name as her father. In the absence of supporting documentation, the RAD did not believe these explanations. The RAD again drew a negative inference, concluding that the Applicant had submitted fraudulent documentation and that these documents did not substantiate her alleged personal identity.

[10] The RAD gave no weight to the Applicant's school certificates, because they were missing photographs and student signatures. It also gave no weight to the Certificate of Origin, as the affidavit from the Applicant's elder brother, who the Applicant claimed obtained her identity documents for her, provided no information on obtaining this document.

[11] The RAD considered the affidavits from the Applicant's family members not to be probative in establishing her personal identity, concluding that they related to the alleged abuse

she suffered at the hands of her husband but did not provide any additional probative information as to her personal identity.

[12] Noting the Applicant's submission that she had given her testimony in the Yoruba language, the RAD found that the Applicant is Nigerian and had lived in Nigeria at some point in her life, but that she had not provided any probative, reliable documentation to prove her personal identity. The RAD explained that this was a determinative issue and rejected the Applicant's claim.

IV. **Issues and Standard of Review**

[13] The Applicant identifies the following issues for the Court's consideration:

A. Whether there was a breach of natural justice;

B. Whether the RAD erred in assessing the evidence; and

C. Whether the RAD erred in assessing the Applicant's credibility and identity.

[14] The parties agree, and I concur, that the natural justice issue is governed by a standard of correctness (see, e.g., *Atim v Canada (Citizenship and Immigration)*, 2018 FC 695 at para 32) and that the other two issues listed above are reviewable by the Court on a standard of reasonableness.

V. **Analysis**

A. *Whether there was a breach of natural justice*

(1) Legal Principles

[15] The Applicant argues that she was deprived of natural justice as a result of alleged incompetent representation by her former counsel, the Intervener. There is no disagreement among the parties surrounding the legal principles applicable to such allegations. As explained by the Supreme Court of Canada in *R v GDB*, 2000 SCC 22 [*GDB*] at paras 26-27, the required analysis involves both a performance component and a prejudice component. While, as noted above, the correctness standard of review applies to the Court's overall analysis whether a party was deprived of natural justice, the performance component, i.e. whether counsel's representation fell short of what is required, is reviewed using a standard of reasonableness. There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance, and the wisdom of hindsight has no place in this assessment.

[16] Similarly, this Court has set a high threshold governing the circumstances and evidentiary criteria that must be met before relief upon judicial review will be given on the basis of the negligence of counsel (see *Odafe v Canada (Citizenship and Immigration)*, 2011 FC 1429 at para 8). In proceedings under the *Immigration and Refugee Protection Act*, SC 2001, c 27, the incompetence of counsel will only constitute a breach of natural justice in extraordinary circumstances and, with respect to the performance component, at a minimum the incompetence or negligence of the applicant's representative must be sufficiently specific and clearly supported

by the evidence (see *Memari v Canada (Citizenship and Immigration)*, 2010 FC 1196 at para 36). With respect to the prejudice component, the party making the allegation of incompetence must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would be different (see *Jeffrey v Canada (Minister of Citizenship and Immigration)*, 2006 FC 605 at para 9).

[17] In the present matter, the Applicant raises a number of allegations against the Intervener, each of which will be addressed below. However, the allegations upon which she places the most emphasis relate to the Intervener's advice surrounding the Attestation of Birth and accompanying Declaration of Age, which were the identity documents submitted with her initial refugee claim, and the Intervener's failure to submit to the RAD evidence of the Applicant's subsequent efforts to obtain a Nigerian passport.

(2) Advice on Attestation of Birth / Declaration of Age before Filing Claim

[18] As noted in the above summary of the Decision, the RAD found that the Declaration of Age and Attestation of Birth were fraudulent because the Attestation of Birth was signed by a person with the same name as the Applicant's father, but her father had died more than 10 years ago. The Applicant claimed that it was her uncle who had signed the documents, that her uncle had assumed the role of her father after his brother's death, and that her uncle had the same name as her father. In the absence of supporting documentation, the RAD did not believe these explanations.

[19] In her affidavit filed in support of this application for judicial review, the Applicant admits that her uncle and her deceased father do not have the same name. She says that her uncle is illiterate, which resulted in him swearing the Attestation of Birth in a manner which indicated that he was her father. The Applicant explains that her uncle did assume the role of her father after her father's death and states that she advised the Intervener of this and of her uncle's illiteracy. However, she says that the Intervener advised her to lie to the RPD at her hearing and to say that her uncle and father have the same name.

[20] The Intervener denies this allegation. In his affidavit, he states that, when he confronted the Applicant with the fact that it appeared to be her late father who deposed to the Attestation of Birth, she stated that it was her uncle who had sworn the document and that he bears the same name as her father, as her grandfather was a polygamist and her father and uncle were born to two different mothers.

[21] If the Court were to accept the Applicant's evidence that the Intervener counselled her to lie to the RPD, this would obviously satisfy the performance component of the allegation of incompetent representation. However, the affidavits of the Applicant and the Intervener provide two irreconcilable versions of events, and the Court must decide which to believe. In making that determination, I have considered the parties' two, again irreconcilable, versions of the larger sequence of events leading to the RPD hearing and testimony surrounding the Attestation of Birth.

[22] The Applicant states that she first met with the Intervener in November 2016 and that he provided her with a list of documents to gather in order to support her claim. She then contacted her family in Nigeria to obtain these documents. A package was sent from Nigeria on November 23, 2016 to the Applicant at the Toronto shelter where she was then residing. She states that this package included the Attestation of Birth and Declaration of Age, both of which are dated November 11, 2016, her ATM cards, and a Certificate of Apprenticeship as an Auxiliary Nurse.

[23] The Applicant deposes that, on the day this package was received, she took it to meet with the Intervener at his office and opened the package in his presence. She then identified that her uncle had inaccurately stated in the Declaration of Age that he was her father and asked the Intervener for advice on this issue. The Applicant says that the Intervener advised her that this was fine and that he subsequently told her to take the Attestation of Birth and Declaration of Age with her when she submitted her refugee claim at the immigration office in Etobicoke. It is undisputed that she attended the immigration office on her own and submitted her claim on January 7, 2017.

[24] The Applicant's evidence is that the only other package of documents she received from Nigeria was sent on February 21, 2017. Her affidavit attaches copies of the November 23, 2016 and February 21, 2017 courier slips.

[25] The Applicant's evidence is that the issue surrounding the Declaration of Age next surfaced around 9:30 PM on the day before her March 1, 2017 RPD hearing, when the Intervener telephoned her and asked why her uncle stated in that document that he was her father. She says

that she confronted the Intervener with the fact that the Declaration of Age had been in his possession for three months. She then provided the explanation that her uncle had assumed the position of her father after her father's death but made the statement that he did in the Declaration of Age because he was illiterate. The Applicant states that the Intervener said he would tell her what to do the next day and that, at the RPD's offices the next morning, he advised her testify that her uncle bears the same name as her father.

[26] Turning to the Intervener's version of events, he agrees that he first met the Applicant in his office in November 2016 and advised her to assemble identity documentation to support her refugee claim. However, he denies that the Applicant provided him with the Attestation of Birth or Declaration of Age prior to filing her claim on January 7, 2017. He states that she brought these documents and others, after receiving them from Nigeria, to a meeting in his office on February 17, 2017. That evening, when reviewing the documents, he identified the issue with the Attestation of Birth and telephoned the Applicant. The Intervener deposes that it was during that call that she advised him that her uncle and father had the same name because they came from a polygamist family. He denies having any discussion of this issue with the Applicant on the day before the March 1, 2017 RPD hearing.

[27] In cross-examination on his affidavit, the Applicant's counsel challenged the Intervener on his version of events, noting that the documents filed by the Applicant on January 7, 2017 included a Schedule 12, signed by both the Applicant and the Intervener on December 6, 2016, which listed the Attestation of Birth by both date of issue and document number. The Applicant argues that this corroborates her version of events, because it demonstrates that the Intervener

had seen the Attestation of Birth, and therefore the accompanying Declaration of Age, by early December 2016.

[28] The Intervener's evidence on cross examination was that the Schedule 12 was completed and signed on December 6, 2016 based on information the Applicant received over the telephone from her brother, who had obtained the Attestation of Birth in Nigeria. The Intervener explained that the Applicant had been ill due to a pregnancy in November and December 2016. Therefore, to minimize the number of visits to his office, he says that they completed and signed the refugee claim forms on December 6, 2016, even though the Attestation of Birth as the supporting identity document had not yet been received, so that the Applicant could proceed to file her claim once that document arrived from Nigeria. There is nothing in the evidence which contradicts this explanation, and I find that the Schedule 12 document does not assist the Court in preferring one version of events over the other.

[29] The Applicant also argues that her version of events is corroborated by the evidence of her case manager at the Toronto shelter where she was residing when she received the DHL package sent on November 23, 2016 from Nigeria. The case manager authored a letter stating that, while the Applicant was staying at the shelter, she received documents from Nigeria via DHL and was given TTC tokens to take the documents to her lawyer. However, as argued by the Intervener, there is no evidence from the case manager as to which documents were included in the DHL package. Again, I find that this evidence provides little assistance to the Court.

[30] The Applicant submits that the Intervener's timeline, which includes the Applicant receiving the Attestation of Birth and Declaration of Age sometime between December 6, 2016 and January 7, 2017 and then bringing the documents to his office on February 17, 2017, is not plausible, because there is no reason why the Applicant would have waited over a month to bring the documents to his office after receiving them. The Intervener similarly submits that that the Applicant's timeline is not plausible, as there is no reason that the Applicant would have waited until January 7, 2017 to file her claim if she had received the Attestation of Birth in late November or early December. The Applicant responds to this argument by pointing out that she was ill from her pregnancy during this period. In my view, that illness could explain the delay to which either party refers. I therefore find neither the Applicant's nor the Intervener's argument particularly compelling.

[31] However, the Intervener does offer some evidence which corroborates his version of events more than that of the Applicant. His affidavit attaches records from the telephone that he states was used in his communications with the Applicant, which document several calls to her telephone number, including an eight minute call at 6:21 PM on February 17, 2017. This is consistent with the Intervener's evidence that he received the Applicant's documents, including the Attestation of Birth and Declaration of Age, at a meeting that day and telephoned her later in the day after reviewing the documents to discuss the issue with her uncle's Declaration. The Intervener also points out that the phone records do not show a call to the Applicant on the day before the March 1, 2017 RPD hearing, which is how and when the Applicant says the Intervener identified the issue with the Declaration. This evidence was not challenged by the Applicant in

the Intervener's cross examination and, as argued by the Intervener, the Applicant has not introduced any evidence to rebut this point.

[32] The Intervener also notes that several of the documents which the Applicant brought to his office on February 17, 2017 were dated after the November 23, 2016 DHL package left Nigeria. He says that the documents he received from the Applicant that day are those which he faxed to the RPD that evening after his call with the Applicant about the issue surrounding the Declaration of Age. The list of documents sent by fax on February 17, 2017 is not in dispute, as the documents are identified in the list that accompanied that fax. They include the Attestation of Birth and Declaration of Age, as well as the Certificate of Origin dated February 6, 2017, the National Population Commission Certificate of Death of the Applicant's son dated February 15, 2017, and the affidavit of the Applicant's brother dated February 10, 2017 used to obtain the Certificate of Death.

[33] I understand the Intervener's argument to be that his receipt by February 17, 2017 of documents dated between the dates of the November 23, 2016 and February 21, 2017 courier packages undermines the Applicant's evidence that she received documents from Nigeria by courier on only those two occasions. Therefore, he argues, the Attestation of Birth and Declaration of Age could have been received between the December 6, 2016 signing of the refugee claim documents and the January 7, 2017 filing of those documents, as the Intervener alleges.

[34] The Applicant's response to this argument is that some of the documents transmitted to the RPD on February 17, 2017 were sent from Nigeria to the Applicant by email, not by courier. She notes that the Intervener sent a second set of documentation to the RPD on February 24, 2017, which she submits were the original documents received in the February 21, 2017 courier package which had not previously been sent by email. As evidence to support her position, she relies upon the transcript of her testimony before the RPD, in which she referred to scanning and emailing documentation from Nigeria, with the original to follow if required. However, this testimony relates solely to a secondary school certificate, which the RPD had noted appeared to have been sent through Google mail as a JPEG file. The copy of this document included in the Applicant's Record includes a footer which references Google mail and may have been what prompted the RPD's inquiry about this document. There is nothing in this testimony which speaks to any other documents having been sent to the Applicant by email. Nor does the Applicant depose to receipt of documents in this matter in the affidavit she filed in support of this application for judicial review.

[35] In his oral submissions responding to the Applicant's submissions on this issue, the Intervener's counsel emphasized the lack of evidence of email transmission of the Applicant's documents. The Applicant acknowledges that there is no documentary evidence of the transmission of some of the Applicant's documents to her by email but argues that this is because the issue came to light only after the deadline for filing further affidavits in this application for judicial review. I do not find this argument compelling, as that the issue was raised by the Intervener's affidavit dated December 18, 2017 and filed on December 21, 2017, deposing that certain of the documents that the Applicant brought to his office in February 17, 2017 were not

in existence in November 2016. As such, this issue was raised well before the April 23, 2018 deadline for the Applicant to file further affidavits.

[36] Taking into account the shortcomings in the Applicant's evidence on this point, I find that the Intervener's argument assists him, although only to a limited extent. I note from the Decision that one of the documents upon which the argument relies, the Certificate of Origin, was a copy, not an original, which therefore could have been received either by email or by courier. Also, the inference that some of the documents dated in February 2017 were received by the Applicant in a courier package other than the two packages identified by the Applicant does not support a conclusion that the Attestation of Birth and Declaration of Age arrived in the same package, as both parties' versions of events recognize that those documents were available in Canada when the Applicant filed her refugee claim on January 7, 2017. At most, the inference that there were more than two courier packages detracts from the credibility of the Applicant's assertion that there were only two and to that limited extent lends support to the Intervener's assertion that the Applicant received the Attestation of Birth and Declaration of Age between the dates of signing and filing her claim.

[37] On balance, I find that the evidence is marginally more supportive of the Intervener's overall timeline and version of events, and I therefore find that the Applicant has not established that she provided the Attestation of Birth and Declaration of Age to the Intervener prior to the filing of her claim. In preferring the Intervener's version of events, I also find that the Applicant has not established that the Intervener counselled her to lie to the RPD about her uncle's name.

[38] Independent of those findings, the Applicant also argues that the Intervener did not meet the standard of competent counsel in that he should not have permitted her to file her refugee claim, with the Attestation of Birth and Declaration of Age as supporting identity documents, without first reviewing those documents. She submits that, had the Intervener reviewed these documents before their submission, he would have identified the issue with the uncle's Declaration and the Applicant would have had an opportunity to rectify the situation, perhaps by obtaining a replacement for the problematic documentation.

[39] The Applicant refers the Court to the Rules of Professional Conduct of the Law Society of Ontario, including the definition of a "competent lawyer" which means a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of the client, including, among other things, investigating facts, identifying issues, ascertaining client objectives, considering possible options, and developing and advising the client on appropriate courses of action. The Applicant's position is that the Intervener breached this standard by failing to investigate the identity documentation upon which the Applicant intended to rely and failing to identify the issue that documentation raised.

[40] The Intervener disputes that permitting the Applicant to rely on the Attestation of Birth and Declaration of Age, without first reviewing those documents, represents a breach of his professional obligations. He notes that refugee claimants will often submit their initial claims along with supporting identity documents, for instance upon arriving at a port of entry to Canada, without ever consulting counsel. I do not find this particular argument compelling, as it is

obvious that counsel has no obligation to advise on identity documentation before their submission if he or she has not yet been retained.

[41] In cross-examination, the Intervener drew a distinction between the client's documents supporting the refugee claim and those establishing his or her identity, testifying that his practice was to review the former and that, in doing so on February 17, 2017, he identified the problem with the identity documentation. He explained that an Attestation of Birth is a document commonly relied upon by Nigerian claimants to establish their identity but also confirmed his awareness that the RPD can have concerns about fraudulent identity documentation emanating from Nigeria. I appreciate the Applicant's argument that, given this awareness, it would have been prudent for the Intervener to have reviewed her identity documentation to ensure that there was nothing that would trigger concern on the part of the RPD. However, I am reluctant to conclude that, in the absence of any specific reason to be concerned about a particular client's identity documentation, counsel has an absolute obligation to review such documentation before the client relies upon it to submit a refugee claim. The Applicant has submitted no authority supporting such a conclusion and, applying the high threshold and reasonableness standard applicable to the performance component of the required analysis, I do not find the Intervener to have breached his professional obligations in this respect.

[42] Moreover, turning to the prejudice component of the analysis, I cannot conclude that there is a reasonable probability that the result of this proceeding would have been different had the Intervener raised the issue with the Declaration of Age with the Applicant prior to the filing of her claim. As I have accepted the Intervener's version of events over that of the Applicant, it

follows that, had the Intervener raised the issue prior to the filing on January 7, 2017, the Applicant would have responded as he says she did on February 17, 2017, i.e. that her uncle had the same name as her father. There is therefore no basis to find that the proceeding would have unfolded differently had the issue surfaced in December or January rather than in February.

(3) Advice on Attestation of Birth / Declaration of Age after Identifying Issue

[43] The Applicant also submits that, once the issue surrounding the Declaration of Age was identified prior to the RPD hearing, the Intervener had an obligation to advise the Applicant on steps to address the concern that the RPD might consider her identity documentation to be fraudulent. She argues, for instance, that the Intervener should have advised her to obtain corroborating evidence to demonstrate that her uncle and her father had the same name.

[44] The Intervener testified in cross examination that, based on his own cultural background, he found plausible the Applicant's explanation that her father and uncle came from a polygamist family and had the same name. His position is that, while another counsel might have made the decision to seek corroborating documentation to support this explanation, this is a matter of judgment and his failure to do so does not represent inadequate or incompetent representation. I agree with this position, which is consistent with the high threshold and reasonableness standard applicable to the performance component of an analysis of alleged incompetence.

[45] The Applicant submits that the Intervener's shortcoming on this issue was even more acute at the stage at which he was preparing her appeal to the RAD, as he was then aware that

the RPD had rejected the Applicant's claim based on her failure to establish her identity and had raised specific concerns about the absence of any documentation to show that her uncle in fact had the same name as her father. When questioned about this in cross-examination, the Intervener stated that his advice to the Applicant in connection with the appeal was to obtain a passport from the Nigerian embassy, to put the issue of identity to rest. The Notice of Appeal was signed on April 18, 2017 and on May 4, 2017 he received a fax from the shelter at which the Applicant was then residing, indicating that she had submitted an application for a passport. He received a further fax dated May 10, 2017, indicating that her interview with the Nigerian Embassy in Ottawa had been set for May 16, 2017.

[46] The Applicant's position is that, notwithstanding her passport application, the Intervener should still have provided her advice on how to address the RPD's concerns about the Attestation of Birth and Declaration of Age, so that she would have an alternative means of proving her identity. Again, my conclusion is that that this argument veers into the area of counsel's judgment. I recognize that, based on the record before the Court, there is no indication that the Applicant has ever been successful in obtaining a Nigerian passport, nor any explanation for such lack of success. However, the record does not indicate any information available to the Intervener at the time he was pursuing the appeal on the Applicant's behalf that would represent an impediment to obtaining a passport as a means of addressing the identity issue. I cannot conclude that the Intervener's representation of the Applicant was inadequate in this regard.

[47] Also, turning to the prejudice component of the analysis, I find this to be a particularly challenging argument for the Applicant to pursue, given the undisputed fact that the uncle and

father did not have the same name. Given this fact, it is difficult to conclude that advice by the Intervener on the merits of obtaining corroborating evidence of a common name had a reasonable probability of changing the outcome of this matter. Clearly it would not have been possible to obtain legitimate evidence to this effect. Perhaps such advice might have led to the Applicant been able to obtain an Attestation of Birth supported by an accurate Declaration of Age. However, there is no evidence to support a conclusion by the Court that there was a reasonable probability of such an outcome.

(4) Failure to Submit Evidence of Passport Application

[48] The final argument emphasized by the Applicant on the natural justice issue is that the Intervener gave her inadequate representation by failing to submit in support of her appeal evidence that she had filed an application for a Nigerian passport. Her affidavit explains that she asked the shelter where she was staying to fax to the Intervener a copy of her passport application on May 10, 2017. The Intervener's receipt of this fax is not disputed. The Applicant also states that she expressly asked the Intervener to include that documentation with her RAD appeal and that she does not know why he did not do so.

[49] In cross examination on this subject, the Intervener testified that he did not send this documentation to the RAD because what was important was the receipt of the passport, not the fact that an application for it had been made. Moreover, the Applicant's interview had been scheduled for May 16, 2017, just a few days after the Intervener received the May 10, 2017 fax, and his expectation based on his experience was that the Applicant would receive the passport on the same day as the interview. The Applicant's Record includes a May 17, 2017 email from the

shelter to the Nigerian Embassy, advising that the Applicant wished to reschedule her interview, because her doctor recommended that she not travel until her baby, who was born on April 21, 2017, was at least two months old. The Intervener testified that he was never provided with a copy of this email, and there appears to be nothing in the record before the Court to contradict this. Rather, he stated that he was pestering the Applicant to provide him with the passport but did not receive any explanation why it was not forthcoming.

[50] When asked in cross-examination why he did not submit to the RAD a copy of the passport application, when it was clear that the May 16, 2017 interview date and had come and gone without a passport becoming available, the Intervener explained that he was concerned this would present a picture of her not being serious or diligent in obtaining documentation to support her identity.

[51] I find these explanations by the Intervener reasonable. However, I do have concern that the Intervener has not addressed the Applicant's evidence that she expressly asked the Intervener to submit her passport application with her RAD appeal. While the Intervener's explanations for not doing so are reasonable, his evidence does not contradict the Applicant's assertion that she asked him to do so and does not indicate that, with the benefit of his advice, she retracted those instructions. I therefore have concern that the record demonstrates the Intervener disregarding the Applicant's instructions, which in my view would satisfy the performance component of the *GDB* test.

[52] However, I cannot conclude that the prejudice component of the test is satisfied. As noted above, there is merit to the Intervener's concerns surrounding the submission of the passport application but not the passport itself, particularly as time continued to pass. Given that there is no evidence on the record that a passport had been issued to the Applicant by the time of the RAD Decision on September 14, 2017, or at any time since, there is no basis for the Court to find that the outcome of proceeding before the RAD would have been different had the RAD been made aware that a passport application had been submitted.

[53] The Applicant notes that the RAD found in its Decision that "it would be reasonable and credible for the Applicant to make an effort to acquire genuine documentation to support her personal identity". While I appreciate that this quotation from the Decision speaks of efforts rather than results, I cannot conclude therefrom that there is a reasonable probability the RAD would have been satisfied on the subject of the Applicant's identity as a result of mere efforts. Indeed, in the subsequent line of the Decision, the RAD expressly states its expectation that the Applicant would seek and obtain a passport:

> She presented documents, referenced below, to the RPD. It would be reasonable that these documents could be presented to the appropriate authorities at the Nigerian Embassy in Ottawa in order to prove her personal identity, and obtain a passport.

[54] Having failed to satisfy the prejudice component of the *GDB* analysis, my conclusion is that the Applicant's natural justice argument associated with the passport application does not represent a basis to interfere with the Decision.

[55] While the arguments canvassed above are those that the Applicant emphasized in support of her allegations of incompetent representation, her affidavit and written representations raise additional arguments, which I will address below.

(5) Other Arguments of Incompetent Representation

[56] The Applicant submits that she provided her auxiliary nursing certificate to the Intervener and that he advised her not to include this evidence. The Intervener addresses this point in his affidavit, stating that he asked the Applicant how she obtained a nursing certificate when she had advised him that her highest level of education was high school. He says that she explained this document was needed to enhance a visa application she made in the past. The Intervener deposes that he asked the Applicant whether the document was legitimate and she did not provide a positive response. He therefore made the decision not to disclose a document of doubtful origin. The Applicant has not challenged this evidence in cross-examination or introduced any evidence to rebut the Intervener's explanation. The Intervener's explanation of his approach to the nursing certificates is a reasonable one, and I find no merit to the allegation of incompetent representation on this issue.

[57] The documents submitted to the RPD included school certificates which did not bear a photograph or student signature, as a result of which the RAD gave them no weight. The Applicant states in her affidavit that the photographs and signatures were missing from these documents because they were obtained from the school by her sister, with the original certificates being at her husband's house and therefore unavailable to her. She alleges that the

Intervener advised her to misrepresent that the certificates submitted were the originals and that it was school policy to provide them without signatures and photographs.

[58] The Intervener denies this allegation, stating that the Applicant advised him that the certificates she provided were the originals. He points out inconsistencies in the Applicant's statements surrounding this issue. An October 23, 2017 letter from the Applicant's present counsel to the Intervener, identifying the Applicant's allegations of incompetent representation, states that the Applicant's brother went to the school to obtain the certificates. However, in her affidavit, the Applicant states that it was her sister who performed this task. Given this inconsistency in the Applicant's evidence, I prefer the evidence of the Intervener and find no incompetent representation relating to the school certificates.

[59] Finally, the Applicant alleges that the transcript of the RPD hearing reveals only a cursory line of questioning by the Intervener on the issue of identity, which was insufficient to allow the Applicant to overcome the RPD's concerns about her identity. I find no merit to this allegation. As submitted by the Intervener, the RPD asked questions surrounding the Applicant's identity and the Intervener asked supplementary questions on this issue. The Applicant has not identified any particular line of questioning related to her identity that might have altered the results of the proceeding before the RPD or the RAD. The Applicant has satisfied neither the performance component nor the prejudice component of the *GDB* test in relation to this allegation.

[60] In conclusion on the natural justice issue, employing the legal principles canvassed earlier in this decision and remaining conscious that the overall standard of review is one of correctness, I find that the Applicant was not deprived of natural justice by her legal representation.

B. *Whether the RAD erred in assessing the evidence*

[61] The Applicant argues that the RAD made several errors in its assessment of her evidence before the RPD.

[62] First, she submits that the RAD erred in in finding that the Applicant's testimony was inconsistent with respect to the photograph in the fraudulent passport that she used when arriving in Canada and its acquisition. The Applicant argues that her testimony was not inconsistent and that any inconsistencies evident in the transcript arose from convoluted questioning by the RPD.

[63] I have reviewed the relevant portion of the transcript from the RPD hearing and agree with the Respondent's position on this issue that, applying the standard of reasonableness, it was available for the RAD to reach the conclusion it did based on the Applicant's testimony. More significantly, as the Respondent points out, the RAD's finding on this issue was based not only on what it considered to be inconsistency in the Applicant's testimony, but also on the finding that it was not credible that, as she testified, the agent had given her no instruction as to how to respond to questions by customs officials. The Applicant has not challenged that component of the RAD's analysis, which I find to be reasonable. Moreover, in considering the Decision as a whole, the RAD's conclusion that the Applicant had not established her identity is based on the

issues surrounding her identity documentation, and I do not consider it possible to conclude that the result may have been different had she provided credible evidence surrounding the documentation she used to enter Canada.

[64] The Applicant also takes issue with the RAD's conclusion that it would have been reasonable for the Applicant to have obtained a passport from the Nigerian Embassy in Ottawa. This argument turns on concern that obtaining a Nigerian passport could be construed as re-availment to the protection of Nigeria. However, this concern was expressly addressed by both the RPD and the RAD. In the Decision, the RAD referred to the Applicant's reliance on *Canada (Public Safety and Emergency Preparedness) v Bashir*, 2015 FC 51 [*Bashir*] and noted that it agreed in part with the Applicant's submission. However, in spite of the re-availment principle, the RAD concluded that it was reasonable to expect that the Applicant would have approached the Nigerian Embassy to obtain a passport and that, given the circumstances, she could then have addressed any potential re-availment problems.

[65] As I read the RAD's reasoning, it is that, in the circumstances of this case, where the Applicant's refugee claimant failed before the RPD because she did not establish her personal identity, she would have been equipped to respond to any re-availment concerns arising from obtaining a Nigerian passport. This reasoning is consistent with the principles explained in *Bashir*, to the effect that the presumption of re-availment is a rebuttable one, which can be rebutted where a foreign national obtains a passport from his country of origin without the intention of returning to that country. I find nothing unreasonable in the RAD's analysis in the circumstances of this particular case.

[66] The Applicant also argues that the RAD erred in giving little weight to her Certificate of Origin because of country condition evidence related to the availability of fraudulent documents in Nigeria, when that evidence was general in nature and did not relate specifically to certificates of origin. I find nothing unreasonable in the RAD's treatment of this document. While the RPD's decision relied in part on the country condition evidence surrounding the of availability of fraudulent documents, the RAD Decision turned principally on the fact that the original of the Certificate of Origin was not available and the fact that the Applicant's testimony regarding the acquisition of this document by her brother was not substantiated by her brother's affidavit.

[67] Finally, the Applicant submits that the RAD erred in its treatment of affidavits from members of her family and neighbours. She argues that the RAD wrongly dismissed these affidavits because the affiants did not include government-issued identification. Again, while that reasoning was a basis for the RPD giving these affidavits little weight, the RAD's conclusion with respect to these affidavits did not turn on this point. Rather, the RAD found that the affidavits provided information surrounding the Applicant's allegations of abuse but were not probative in establishing her personal identity. I recognize the Applicant's point that these affidavits speak to the affiants' relationships with the Applicant. However, this content was not overlooked by the RAD. It noted in its reference to the RPD findings that the affiants stated how they were related to the Applicant, but the RAD found that the affidavits did not provide any additional probative information as to the personal identity of the Applicant. I find the RAD's conclusions as to the probative value of the affidavits to be within the range of possible, acceptable outcomes contemplated by the reasonableness standard.

C. *Whether the RAD erred in assessing the Applicant's credibility and identity*

[68] The Applicant argues that the RAD erred in dismissing the Applicant's claim based on her failure to establish her identity, without providing an opportunity for assessment of the risks alleged by her claim. She relies on this Court's decision in *Gulamsakhi v Canada (Citizenship and Immigration)*, 2015 FC 105 at para 9, which cautioned against drawing negative conclusions based on the use of smugglers and forged documents to escape violence and persecution. The Applicant also refers to *Koffi v Canada (Citizenship and Immigration)*, 2016 FC 4 at para 44 to similar effect.

[69] I find these principles to have little application to the present case. The RAD Decision did not turn on the fact that the Applicant employed a fraudulent passport to enter Canada but on her failure to provide credible and probative evidence of her personal identity.

VI. **Certified Question**

[70] None of the parties raised any question for certification for appeal, and none is stated.

JUDGMENT in IMM-4270-17

THIS COURT'S JUDGMENT is that:

1. The style of cause in this application is amended to add the Intervener, Pius Lekwuwa Okoronkwo.

2. This application for judicial review is dismissed.

3. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4270-17
STYLE OF CAUSE:	BILIKISU OLAYOMIBO OLAYINKA V THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	JULY 25, 2018
JUDGMENT AND REASONS:	SOUTHCOTT J.
DATED:	OCTOBER 3, 2018

APPEARANCES:

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