Federal Court  Cour fédérale

Date: 20210727

Docket: IMM-6919-19

Citation: 2021 FC 795

Ottawa, Ontario, July 27, 2021

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

MARY ANNE NWAFOR EP ANTOINE SAYEGH
JEAN-PIERRE SAYEGH
JEAN-MARK SAYEGH

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Principal Applicant, Mary Anne Nwafor Ep Antoine Sayegh (the PA) and her children, Jean-Pierre Sayegh and Jean-Mark Sayegh (the Minor Applicants), seek judicial review of the August 30, 2019 decision of the Refugee Appeal Division (RAD), of the Immigration and Refugee Board (IRB). The RAD upheld the November 14, 2018 decision of the Refugee

Protection Division (RPD) of the IRB determining that the Applicants are not Convention refugees nor persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [*IRPA*].

[2] The determinative issue in the appeal was the sufficiency of evidence to establish the Applicants' well-founded fear of persecution or risk of harm in Nigeria. The RAD found that there was insufficient evidence to establish more than a mere possibility of future persecution in Nigeria for their refusal to participate in cleansing rituals or that the Minor Applicants would suffer discrimination amounting to persecution on the basis of their biracial ethnicity.

[3] For the following reasons, the application will be dismissed.

II. **Relevant Facts**

[4] The Applicants are all Christians and citizens of both Nigeria and Lebanon. The PA is of Nigerian origin. She married a Lebanese man with whom she had three sons, two of whom are the Minor Applicants. She claims that her family does not accept that she married a non-Nigerian and that her children are biracial.

[5] The PA alleges that in 2001 her father and family living in Asaba, Nigeria, began to request that she and her sons perform cleansing rituals in order to be accepted by the family. The requested rituals included: buying ostrich eggs and tortoises, carrying a pot on her head, and requiring the children to drink animal blood. The PA and her husband refused.

[6] The PA testified that she started receiving threats in early 2006. She was told that she would lose her children one by one. The Applicants then moved to Lebanon in 2006. The PA's husband stayed in Nigeria, living and working in Abuja.

[7] The Applicants lived in Lebanon from 2006 to 2017. During this period, the husband of the PA continued to live and work in Abuja without incident.

[8] The Applicants returned to Abuja numerous times over the years for up to one month at a time. During these visits, they stayed in the husband's house. The PA claims that her family knew she was there and sent "threats" by telling her brother and sister over the telephone that they knew the PA was around.

[9] In July and August of 2017 the PA applied for Canadian visas in order to look at universities for the youngest son.

[10] The PA's father died on August 26, 2017. The Applicants returned to Nigeria for his funeral at the end of September 2017. The PA was told by the Diokpa (the head of the family) that she and her children must undergo cleansing rituals in order for her father to be buried. The PA told her family that such rituals were against her religion. Some family members then threatened to "forcefully subject" the Applicants to the rituals.

[11] The Applicants agreed to participate in a "small initiation ceremony which involved nothing much" and do the rest of the ritual after the burials of the PA's father. The Diokpa told

the Applicants that the ritual must be done by December 15, 2017. When the PA asked the Diokpa if that was a threat, he stated, “we shall see”. The Applicants completed the initiation ceremony but did not complete the rest of the ritual.

[12] On December 13, 2017, the PA reported to the police in Asaba, that there were persistent threats to her life and her children by her paternal family members. She stated that she was told of “the grave consequences involving spiritual manifestation of powers,” if she failed to show up for the rituals. The police advised her to resolve the issue amicably.

[13] The Applicants left for Canada on December 25, 2017. As of the hearing of this application, the husband of the PA still lived and worked in Abuja, apparently without incident.

III. **The Decision under Review**

[14] After listening to the recording of the RPD hearing and reviewing the written submissions, the RAD rejected the Applicants’ appeal of the RPD decision.

[15] The RAD found the determinative issue on appeal was whether the RPD erred in finding there was insufficient evidence to establish that the Applicants had a well-founded fear of persecution or risk of harm in Nigeria.

[16] The RAD rejected six pieces of new evidence tendered by the PA, all of which would have been reasonably available before the RPD hearing was held.

[17] Applying a correctness standard, the RAD reviewed the record and agreed with the RPD that the Applicants had failed to adduce sufficient evidence to establish their claims.

[18] The RAD findings will be examined in the analysis of the reasonableness of the Decision.

IV. **Preliminary Matters**

A. *Unclean Hands*

[19] The Respondent argues that the Applicants do not come before this Court with clean hands. They have evaded the Canada Border Services Agency attempts to execute a lawful removal order and are now fugitives from justice. As judicial review is subject to the discretion of the Court, the Respondent argues, with reference to a number of previous cases, that this Court should refuse to hear the application.

[20] The Applicants argue that the issuance of the removal order against them, while they had a pending application for reconsideration on humanitarian and compassionate grounds, was due to the incompetence of their counsel before the RAD (RAD counsel). They also argue that they were erroneously advised not to challenge the decision of the RAD before this Court. These arguments will be addressed in the analysis of the allegations of incompetent counsel.

[21] In *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2006 FCA 14 [*Thanabalasingham*] the Court of Appeal answered the following certified question addressing clean hands at para 8:

> When an applicant comes to the Court without clean hands on an application for judicial review, should the Court in determining

> whether to consider the merits of the application, consider the consequences that might befall the applicant if the application is not considered on its merits?

[22] The Court of Appeal rejected the submission that where an applicant does not have clean hands the Court must refuse to hear or grant the application on its merits. Rather, a reviewing court may dismiss the application with their proceeding to determine the merits: *Thanabalasingham* at para 9.

[23] Ultimately, at para 17, the Court of Appeal answered the certified question by saying that "a consideration of the consequences of not determining the merits of an application for judicial review is within the Judge's overall discretion with respect to the hearing of the application and the grant of relief."

[24] The Court is directed "to attempt to strike a balance between, on the one hand, maintaining the integrity of and preventing the abuse of judicial and administrative processes, and on the other, the public interest in ensuring lawful conduct of government and the protection of fundamental human rights": *Thanabalasingham* at para 10.

[25] A non-exhaustive list of factors to be considered as part of the Court's exercise of discretion includes "the seriousness of the applicant's misconduct and the extent to which it undermines the proceeding in question, the need to deter others from similar conduct, the nature of the alleged administrative unlawfulness and the apparent strength of the case, the importance of the individual rights affected and the likely impact upon the applicant if the administrative action impugned is allowed to stand.": *Thanabalasingham* at para 10.

[26] No arguments with respect to any of the balancing factors were put forward by the Applicants. The only argument has been that their incompetent counsel erroneously advised them not to challenge the decision of the RAD before this Court and so was responsible for putting the Applicants in the position of having unclean hands because a statutory stay was not available.

[27] This is a proposition which I reject outright. The Applicants freely chose not to report for removal. There is no evidence that they were counselled to, or directed to, evade removal.

[28] By evading removal, the PA directly challenged the integrity of the judicial and administrative processes of the Canadian immigration system.

[29] For that reason, I have determined the Applicants have unclean hands and I find that I may exercise my discretion to dismiss the application on that basis.

[30] However, for completeness, I am providing my reasons for determining that this application can also be dismissed on the merits.

B. *Fresh Evidence in this Application*

[31] The Applicants seek to adduce fresh evidence before this Court that was not submitted to the RPD or the RAD. The evidence relates to the PA's divorce. The final divorce decree was issued on October 4, 2019, one month after the RAD decision was issued.

[32] There are limited exceptions to the rule that judicial review should only consider the materials that were before the original decision-maker. Exceptions are made if the proposed evidence: (1) contains general information to help the Court understand the issues; (2) may demonstrate a procedural defect that cannot be found in the evidentiary record; (3) is presented to highlight the complete absence of evidence before the decision-maker when it made the particular finding: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency* 2012 FCA 22 at para 20.

[33] Evidence of the PA's post-appeal divorce does not meet any of the established exceptions. It will not be admitted. I note as well that there is nothing to indicate that admitting the divorce decree as evidence would assist the Court in any way with assessing the reasonableness of the Decision. The PA states her divorce shows she would not be safe if returned to Nigeria. I find that is a matter for a different proceeding.

Issues

[34] The Applicants raise three issues:

1. Was the RAD's determination of insufficient evidence reasonable?
2. Was the RAD's decision not to admit new evidence reasonable?
3. Were the Applicants denied procedural fairness due to incompetence of counsel?

[35] Overall, the issue is whether the Decision is reasonable.

V. **Standard of Review**

[36] The Applicants' Memo of Fact and Law (AMFL) was filed before the decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] was released. They argue that the standard of review is reasonableness, except that correctness should apply to the issue of the RAD's interpretation and application of the law.

[37] In *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 [*Huruglica*], the Federal Court of Appeal set out in some detail the nature of the role of the RAD when reviewing a decision of the RPD. The conclusion was that the RAD reviews the RPD decision on a standard of correctness. However, on judicial review, reasonableness is the standard to be applied by this Court to a decision of the RAD: *Huruglica* at paras 30 and 35.

[38] More recently, the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] extensively reviewed the law of judicial review of administrative decisions. The Supreme Court confirmed that judicial review of an administrative decision is presumed to be on the standard of reasonableness. This presumption is subject to certain exceptions, none of which apply on these facts: *Vavilov* at para 23.

[39] *Vavilov* also confirmed, citing *Dunsmuir*, that a reasonable decision is not only one that displays justification, transparency and intelligibility. On review, the focus must be on the decision actually made, including the justification or rationale offered for it and not on the conclusion the court itself would have reached. Both the reasoning process and the resulting outcome of the decision are to be considered: *Vavilov* at paras 15, 83 and 87.

[40] The incompetence of counsel allegation involves a breach of the procedural fairness rights of that counsel's client, in this case, the Applicants.

[41] The Supreme Court of Canada in *R v GDB*, 2000 SCC 22 set out at paragraph 27, the general approach to be taken when an issue of the ineffectiveness of counsel is being reviewed:

> 27. Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The wisdom of hindsight has no place in this assessment.

VI. **The RAD's determination of insufficient evidence is reasonable**

[42] The RAD considered both the content of the threats and the consequences to the Applicants for refusing to undergo the rituals.

[43] The PA alleged that in 2006 members of her family threatened that she would lose her children one by one, for not undergoing the rituals.

[44] The RAD observed that despite numerous visits to Nigeria after 2006, there was no evidence of any attempts to directly contact the Applicants or harm them. The PA said that "threats" were sent via her siblings but she did not describe any statements from her relatives suggesting any harm would come to the children. There was also no evidence that the husband had been directly harassed, threatened or harmed between 2006 and 2018 while he lived and worked in Abuja.

[45] When the PA returned in September, 2017 for the funeral of her father she indicated that vague threats were made as well as promises that the Applicants would be "tormented by spirits of the gods." Threats that were reported to the police were described and limited to "spiritual powers" coming after the Applicants.

[46] It is not clear whether the threat that the PA would lose her children one by one meant that the family would harm the children, or that it was simply another assertion of their belief that if the rituals were not performed she would be tormented by spiritual powers.

[47] The RAD noted that the family demanding the rituals live approximately eight hours driving distance from Abuja. It was reasonably found that the family members informing the PA that they knew she was in town was not a threat of harm and that no attempts to harm her or her children had been made in any of her visits to Abuja.

[48] I find that the RAD reasonably concluded, based on the evidence, that the extent of any consequences to the Applicants for refusing to perform the rituals, or because of the interracial marriage or the children's biracial ethnicity was that they would be shunned or ostracized by the family.

[49] The RAD's conclusion that there is no serious possibility of persecution or risk of harm in Nigeria based on the lack of evidence is reasonable.

VII. **The RAD's decision not to admit new evidence was reasonable**

[50] The RAD held that the initial submission of new evidence in the appeal record of the Applicants suffered from procedural deficiencies. However, the Applicants submitted an Amended Appeal Record within one week of being informed of these defects. The Amended Appeal Record was accepted as compliant with the procedural requirements under the *Refugee Appeal Division Rules*, SOR/2012-257.

[51] The new evidence the Applicants sought to have admitted consisted of:

1. an affidavit sworn by the PA on December 21, 2018;
2. an addendum to that affidavit sworn on January 10, 2019;
3. certificates of baptism and confirmation of the minor Applicants;
4. photos of the Applicants participating in rituals with descriptions by the PA;
5. photos and communication from the husband of the PA dated October 2018;
6. several online articles about traditional practices in Nigeria.

[52] The Applicants argued that they could not have reasonably adduced the new evidence before the RPD because they were not properly advised by their then counsel as to the evidence that would be required to establish their claim.

[53] The RAD found however that the evidence was inadmissible because the Applicants had not followed the steps required to present a claim of incompetence of counsel. The steps include lodging a complaint against counsel at the RPD (RPD counsel) with the governing body or

providing an opportunity for counsel to respond to the allegation: *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 *Singh* at para 66 [*Singh*].

[54] The RAD also found that the Applicants had not followed the steps in the IRB practice notice that outlined the steps to be followed when making an allegation against former counsel for inadequate representation. To that end there was no indication that the Applicants had followed the steps or that their previous counsel had an opportunity to respond to the allegations.

[55] I find the decision by the RAD not to accept the new evidence was reasonable as the condition precedent to such filing had not been met. The RAD has no discretion to accept new evidence that does not meet one of the provisions set out in subsection 110(4) of the *IRPA*: *Singh* at paras 35 and 63.

[56] This allegation is considered in more depth in the analysis of the following issue.

VIII. **The Applicants were not denied procedural fairness due to alleged incompetence of counsel**

[57] Allegations of incompetent counsel are not new in immigration matters.

[58] The Applicants allege in this application that RAD counsel was grossly incompetent by (1) not following the proper procedure to introduce new evidence at the RAD and (2) not presenting evidence of the incompetence.

[59] I do not find it necessary to address the allegation with respect to the new evidence. As just discussed above, the error was corrected by RAD counsel and the evidence was accepted by the RAD. It is not an example of incompetence by RAD counsel. If anything, it is an example of competent counsel who quickly moved to correct an error upon receiving notice from the RAD.

[60] The PA relies on the finding by the RAD that contrary to the IRB practice notice, there was no evidence of a complaint being lodged against RPD counsel nor was any explanation personally provided by that RPD counsel.

[61] The Applicants submit that this failure "conclusively establishes that previous counsel was grossly incompetent in handling the applicant's refugee claim at the RPD." I note that the reference should be to the RAD, not the RPD.

[62] It is true that "an allegation of professional incompetence of counsel will not be upheld if there is no evidence that a complaint has been filed with the competent authorities of the bar to which the counsel belongs or without an explanation personally issued by the professional involved": *Singh* at para 67.

[63] However, there are two sides to every story.

[64] In this application, RAD counsel filed extensive submissions addressing a number of allegations made by the PA. The submissions of relevance here are those addressing the issue of counsel incompetence. The submissions included narrative as to the content of various meetings

with the PA and evidence in the form of documents showing that the PA refused to agree to pursue RPD counsel for incompetence. Various emails from the PA indicating a less than scrupulous approach to the truth are also in the submissions.

[65] I have carefully reviewed RAD counsel's submissions and the supporting documentation.

[66] I find that there is clear evidence that the lack of a complaint to the governing body is solely the responsibility of the PA who refused to sign a letter from RAD counsel to RPD counsel, dated November 27, 2018, that was to be the notice of allegations. The notice letter from RAD counsel was to be signed by the PA at the foot to indicate her awareness of the allegations. While the PA had agreed to sign the form authorizing release of confidential information she would not sign the notice letter for reasons she provided to RAD counsel.

[67] RAD counsel noted in his submissions that the PA "continued to be uncooperative in filing a complainant (sic) against Former Counsel #1. Without her evidence by way of affidavit or willingness to answer questions by an investigator I could not proceed with the complaint."

[68] By refusing to allow RAD counsel to send the letter that had been drafted to the RPD counsel, which did contain specifics of the alleged errors, the PA became the author of her own misfortune. She cannot legitimately now say that when the RAD counsel followed her instructions, after explaining the problem to her, that he was providing incompetent representation.

[69] The Notice of Application for Leave and Judicial Review (AFLJR) was filed on November 14, 2019. The only references to RAD counsel were with respect to the request for an extension of time to file the application stating that "the applicants received incorrect advice from their previous counsel, namely that they were unable to challenge the negative decision of the RAD; and that the only course of action available to them was to apply for permanent residence on Humanitarian & Compassionate Grounds." (H&C)

[70] The AMFL is dated December 9, 2017, I presume the year should be 2019. The date it was drafted is eight days before notice was given to RAD counsel and twenty-five days after the AFLJR was filed. The AMFL states that current counsel for the Applicants complied with the Procedural Protocol of this Court and had provided written notice to RAD counsel. On the face of it, that is not correct but it may be that the AMFL was filed later than the day it was dated.

[71] The AFLJR also sought an extension of time for filing for the reasons that: (1) when the Applicants sought independent legal advice she discovered that the Decision could have been challenged in this Court; and, (2) when the possibility was discovered the deadline for filing the application had already passed.

[72] The submissions from RAD counsel vigourously deny this allegation. RAD counsel submitted that he explained both judicial review of the RAD decision and an H&C application suggesting that the PA pursue both. She said she could only afford one and that she wanted to pursue the H&C application.

[73] The AFLJR sets out 20 boilerplate grounds for judicial review plus a basket clause. None of the grounds referred to the incompetence of RAD counsel.

[74] On December 17, 2019, three days after filing the AFLJR, shortly before midnight, present counsel for the PA notified RAD counsel by fax of six allegations of professional incompetence made by the PA. All of those allegations have been satisfactorily addressed by RAD counsel in his written submissions.

[75] In this Court, Mr. Justice Southcott has held that "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": *Olayinka v Canada (Citizenship and Immigration)*, 2018 FC 975 at para 16.

[76] The nature of the threats made against the Applicants and the several trips back to Nigeria without incident lead me to conclude that, even if the evidence the Applicants sought to adduce before the RAD had been accepted, there would not have been a reasonable probability that the result in the original decision would have been different. In that respect, the Applicants have failed to meet their onus.

IX. **Conclusion**

[77] For all of the foregoing reasons, the application is dismissed.

[78] Neither party proposed a question for certification nor does one exist on these facts.

JUDGMENT IN IMM-6919-19

THIS COURT'S JUDGMENT is that the application is dismissed. There is no question for certification.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6919-19
STYLE OF CAUSE:	MARY ANNE NWAFOR EP ANTOINE SAYEGH, JEAN-PIERRE SAYEGH, JEAN-MARK SAYEGH v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	JANUARY 12, 2021
JUDGMENT AND REASONS:	ELLIOTT J.
DATED:	JULY 27, 2021

APPEARANCES:

Henry Igbinoba	FOR THE APPLICANTS
Charles J. Jubenville	

SOLICITORS OF RECORD:

Henry Igbinoba Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT