Federal Court Cour fédérale

Date: 20240830

Docket: IMM-7427-21

Citation: 2024 FC 1361

Ottawa, Ontario, August 30, 2024

PRESENT: Mr. Justice Norris

BETWEEN:

ISBAT MOROLAYO EDU-ADESOKAN
ABDUSSOBUR ADEMILEKAN ADESOKAN
ABDULHAMEED ADEOLA ADESOKAN
RAHAMATULLAH ADEBUKOLA ADESOKAN
ABDULHAQQ ADEBOWALE ABDULKAREEM-ADESOKAN
FATIMA ADEBOLA ADESOKAN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] Isbat Morolayo Edu-Adesokan, the principal applicant, and her five children, the co-applicants, are citizens of Nigeria. They sought refugee protection in Canada on the basis that

the principal applicant's husband (the father of the co-applicants) had been forced to join Boko Haram, a militant Islamist group, and the applicants feared they would also be forced to join the group. The principal applicant also claimed that she was at risk at the hands of the Nigerian Police because she had failed to report a fellow teacher who had engaged in same-sex sexual activity. The Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada (IRB) rejected the claims for protection on credibility grounds. The Refugee Appeal Division (RAD) of the IRB dismissed the applicants' appeal of the RPD's decision.

[2] The applicants now apply for judicial review of the RAD's decision under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). They submit that the decision was rendered in breach of the requirements of procedural fairness because of the ineffective assistance of counsel who originally acted for them on their appeal to the RAD. They also submit that the RAD's decision upholding the RPD's negative credibility findings is unreasonable.

[3] For the reasons that follow, this application for judicial review will be dismissed. As I stated at the hearing of this application, the issue of ineffective assistance of counsel is not properly before the Court. As for the merits of the RAD's decision, the applicants have not established any basis for this Court to intervene.

II. BACKGROUND

A. *The Applicants' Narrative*

[4] According to the principal applicant, in July 2018, her husband, who is a Muslim cleric, disclosed to her that he was being pressured to join Boko Haram. He told her that members of the group had threatened to kill him and his family if he did not join. At his suggestion, the principal applicant and her children relocated from their home in Ede, a town in Osun State, to Port Harcourt. The principal applicant's husband did not accompany them and the principal applicant does not know where he was during this time. The principal applicant and her children then left Port Harcourt for Ibadan on August 25, 2018, because of unrest in Port Harcourt. The principal applicant's husband did not join them in Ibadan but they remained in contact by telephone.

[5] On September 10, 2018, the principal applicant and her children were attacked in their home in Ibadan by people claiming to be members of Boko Haram who were looking for her husband. (This incident and the move to Ibadan were omitted from the principal applicant's original narrative prepared in October 2018. They were added in an amended narrative prepared in March 2019.) After this attack, the principal applicant and her husband decided that she and the children should leave for the United States. To pay for this trip, the principal applicant decided to sell the school she owned in Osogbo, Osun State.

[6] The applicants left Ibadan for Lagos and then departed for the United States on September 13, 2018. The applicants all had valid US visas because, before these events, they had

been planning to take a vacation there. (The applicants had applied for Canadian visitor visas in April 2018 but the applications were refused.) The principal applicant's husband stayed behind because his passport had expired and he did not have a US visa.

[7] The applicants arrived in the United States on September 14, 2018. After being advised not to seek asylum in the United States, they entered Canada irregularly at the Roxham Road border crossing on September 16, 2018, and made claims for refugee protection.

[8] According to the principal applicant, in December 2018, her husband called her in Canada to tell her that he had joined Boko Haram and that she must return to Nigeria and join the group as well.

[9] The principal applicant also claimed that on October 13, 2019, her brother called her from Nigeria to tell her that the police, her husband, and some members of the local mosque had just been to his home looking for her. The police wanted to question her about a teacher at her school who had engaged in same-sex activities in March 2018, an incident the principal applicant had known about at the time but did not report to the authorities. The police had left an invitation letter dated October 12, 2019, directing the principal applicant to report for questioning in Osogbo on October 28, 2019. This alleged visit from the police occurred less than a month before the applicants' RPD hearing.

B. *The RPD Decision*

[10] The RPD hearing took place on November 4, 2019. Counsel for the applicants requested an opportunity to provide post-hearing documentary evidence. This evidence, which addressed the relationship between Boko Haram and the Fulani Herdsmen (an issue that had arisen during the hearing), was submitted on November 13, 2019.

[11] In a decision dated November 25, 2019, the RPD rejected the claims on credibility grounds. The RPD concluded that "numerous and substantial credibility concerns" caused it to "doubt the veracity of all of the claimants' evidence." The RPD found that, as a result, the applicants had failed to present sufficient credible and trustworthy evidence to establish, on a balance of probabilities, that they are being sought by the principal applicant's husband, by Boko Haram, or by the Nigerian police.

[12] In summary, the RPD found as follows:

- The principal applicant had given inconsistent accounts of her movements in Nigeria prior to leaving for the United States.

- The dates on the deed of transfer agreement for the sale of the principal applicant's school (August 20, 2018) were inconsistent with the sequence of events the principal applicant described in her narrative. In particular, in her narrative, the principal applicant stated that she only decided to leave Nigeria after the attack in Ibadan on September 10, 2018. The RPD found that either the principal applicant was relying on

fraudulent documents relating to the sale of the school or she was attempting to mislead the RPD about when and why she sold the school.

- An affidavit from the principal applicant's brother dated June 24, 2019, was fraudulent. The RPD based this finding on the unexplained pixilated appearance of the deponent's signature on the document.

- The letter of invitation from the police tendered by the applicants is fraudulent. The RPD based this finding on obvious irregularities in the document.

- The principal applicant provided inconsistent information about the delivery of the police invitation letter. While her narrative stated that her brother told her the police had visited his home and left the invitation letter with him, an affidavit purporting to be from the principal applicant's brother stated that he received the invitation letter from the principal applicant's husband on October 12, 2019, when he (the brother) happened to be visiting Osogbo. The affidavit says nothing about a visit from the police to his home.

- Other affidavits relied on by the applicants were insufficient to establish the truth of the central allegations and did not overcome the credibility concerns relating to the principal applicant's evidence.

[13] On the basis of these findings, the RPD concluded that the applicants are not Convention refugees or persons in need of protection. Accordingly, their claims were rejected.

C. *The Appeal to the RAD*

[14] The applicants retained new counsel (a paralegal) to represent them on their appeal to the RAD.

[15] The applicants sought the admission of several documents as new evidence under subsection 110(4) of the *IRPA*. The new evidence included an affidavit sworn by the principal applicant on March 5, 2020, in which she attempted to address many of the RPD's concerns about her evidence. The new evidence also included an affidavit sworn by the principal applicant's brother on January 22, 2020, explaining why his earlier affidavit of June 24, 2019, contained a scanned version of his signature. (An affidavit from a colleague of the principal applicant's brother who had assisted in the preparation of the earlier affidavit gave a similar account.) The principal applicant's brother also provided a second affidavit also sworn on January 22, 2020, in which he repeats the contents of his earlier affidavit verbatim. Submissions in support of the new evidence simply stated that the evidence "could not reasonably have been expected in the circumstances for the Appellants to present as the evidence was not made available, or only became available shortly before, within the hearing or shortly after the rejection."

[16] On the merits of the appeal, the applicants submitted that the RPD member was biased or there was a reasonable apprehension of bias and that the member erred in her adverse credibility findings.

[17] In November 2020, after the appeal was perfected, the applicants applied under Rule 29 of the *Refugee Appeal Division Rules*, SOR 2012-257 (*RAD Rules*), for the admission of additional documentary evidence. The additional evidence consisted of an affidavit sworn by the principal applicant on November 14, 2020, to which were attached a number of exhibits that, among other things, addressed country conditions in Nigeria and attested to the principal applicant's good standing in her local community in Sudbury.

D. *The RAD Decision*

[18] In a decision dated September 23, 2021, the RAD dismissed the appeal and confirmed the RPD's determination that the applicants are neither Convention refugees nor persons in need of protection. The RAD found that none of the new evidence included in the Appellants' Record met the requirements of subsection 110(4) of the *IRPA* because it was available to the applicants before the RPD rendered its decision and the applicants had not shown that they could not reasonably have been expected to adduce it earlier. The RAD also noted that the principal applicant's affidavit sworn on March 5, 2020, often strayed improperly into argument; the RAD was nevertheless prepared to consider those parts of the affidavit as submissions in support of the appeal. With respect to the documents tendered under the Rule 29 application, the RAD found that only one document was admissible (it related to conditions in Nigeria that post-dated the RPD decision). The rest of that evidence was either irrelevant or could have been adduced before the RPD.

[19] On the merits of the appeal, the RAD agreed with the RPD that the cumulative effect of the negative credibility findings warranted the rejection of the claims for protection. In

comprehensive reasons, the RAD provided a detailed analysis of the evidence and submissions to explain why it agreed with all of the RPD's negative credibility findings.

E. *The Application for Leave and for Judicial Review*

[20] On October 20, 2021, the applicants filed a Notice of Application for Leave and for Judicial Review of the RAD decision. The grounds for review set out in the notice are entirely generic and simply track the language of subsection 18.1(4) of the *Federal Courts Act*, RSC 1985, c F-7.

[21] The applicants' Application Record was filed on November 19, 2021. Their Memorandum of Argument advanced three main grounds for review: (1) the applicants were denied natural justice and procedural fairness before the RAD due to their previous counsel's negligence; (2) the RAD unreasonably determined that some of the new evidence tendered by the applicants is inadmissible; and (3) the RAD's adverse credibility findings are unreasonable.

[22] The respondent's Application Record opposing leave was filed on December 20, 2021.

F. *The Request to Re-Open the Appeal*

[23] Meanwhile, on December 7, 2021, the applicants applied to the RAD under Rule 49 of the *RAD Rules* to re-open their appeal on the basis of the inadequate representation of their former counsel before that tribunal. On January 20, 2022, the applicants submitted an informal request, on the consent of the respondent, to have their leave application held in abeyance

pending a decision by the RAD on the application to re-open their appeal. This request was granted by Prothonotary Aalto in an order issued on the same date.

[24] As it happened, by this time, the RAD had dismissed the application to re-open the appeal in a decision dated January 18, 2022. The decision was only mailed to the applicants on January 20, 2022, however.

[25] Under Rule 49(6) of the *RAD Rules*, the RAD must not allow an application to re-open an appeal "unless it is satisfied that there was a failure to observe a principle of natural justice." The RAD concluded that the applicants had not established that this was the case. The RAD noted that the allegation of inadequate representation challenged the competence of former counsel in two key respects: first, by failing to make sufficient submissions in support of the new evidence submitted on appeal; and second, by attempting to submit support letters on appeal that were not relevant. The RAD was not persuaded in either respect.

[26] The RAD found that, while counsel could have provided more detailed submissions on the admissibility of the new evidence, when the submissions on appeal were considered as a whole, the applicants had not rebutted the strong presumption that counsel acted competently. Even if the submissions on the requirements of subsection 110(4) of the *IRPA* were brief, counsel's submissions did engage adequately with the relevance and probative value of the new evidence. Likewise, the RAD found that simply because "a piece of new evidence may not be persuasive or relevant does not mean that Counsel is incompetent for having attempted to get the evidence admitted." While the earlier RAD panel had rejected the community support affidavits

as irrelevant, the second RAD panel was satisfied that former counsel had submitted them in an attempt to comprehensively defend his clients' position. That the evidence was found to be irrelevant did not demonstrate incompetence on counsel's part. In any event, the applicants had not suffered any prejudice as a result of their former counsel's actions. Accordingly, the RAD dismissed the application to re-open.

[27] Despite the order of Prothonotary Aalto stating that the applicants were to notify the respondent and the Court immediately upon receiving a decision from the RAD on the application to re-open, this did not happen. It was only a year later, on January 13, 2023, that counsel for the applicants informed the Court, in response to a second inquiry about the status of the matter, that the application to re-open had been dismissed.

G. *Subsequent Events*

[28] The applicants did not seek leave to amend their application for leave and for judicial review to incorporate the January 18, 2022, decision of the RAD, as would be required to comply with Rule 302 of the *Federal Courts Rules*, SOR/98-106 (*FCR*). Nor did they commence a separate application to seek judicial review of the decision refusing to re-open the appeal.

[29] Pursuant to the Court's settlement project, on March 31, 2023, Justice Brown issued an order for the production of the Certified Tribunal Record. Leave to proceed with the judicial review application was then granted on September 21, 2023.

[30] The applicants did not file a Further Memorandum of Argument on this application. Nor did they file a copy of the RAD's January 18, 2022, decision.

[31] On October 25, 2023, the respondent filed an affidavit to which was attached as an exhibit a copy of the January 18, 2022, decision. The respondent filed a Further Memorandum of Argument on November 27, 2023.

[32] With respect to the allegation of ineffective assistance of counsel, the respondent submitted that this ground should be rejected for three reasons: (1) since the applicants did not challenge the decision refusing to re-open the appeal, the RAD's findings regarding the conduct of their former counsel must be presumed to be reasonable; (2) the applicants' arguments amount to an impermissible attack on the decision refusing to re-open the appeal; and (3) in any event, the applicants have failed to meet the test for ineffective assistance of counsel.

[33] As I explain below, in my view, the failure of the applicants to challenge the January 18, 2022, decision by way of judicial review is determinative.

III. ANALYSIS

A. *The Ineffective Assistance of Counsel Allegation*

[34] As stated above, I have concluded that the allegation that the applicants' original counsel before the RAD was incompetent is not properly before the Court on this application for judicial review.

[35] I acknowledge that this ground for review was raised in the applicants' Memorandum of Argument in respect of which leave to proceed with their application for judicial review was granted. However, their application to re-open their appeal raised the very same question: Was there a miscarriage of justice because they were not represented competently in their appeal to the RAD? In my view, once the RAD rejected the application to re-open on this ground, the applicants had to re-frame their application for judicial review if they still intended to pursue the ineffective assistance of their former counsel as a ground of review.

[36] The applicants were not required to apply to re-open their appeal before seeking judicial review of the September 23, 2021, RAD decision on the basis of the ineffective representation of their former counsel. However, having done so and failed, if they still wished to pursue this as a ground for review, it was incumbent on them to seek judicial review of the January 18, 2022, decision as well. They could have done this in either of two ways: by seeking leave to amend their original Notice of Application to incorporate the January 18, 2022, decision; or by bringing a separate application for leave and for judicial review of that decision (which would presumably then be joined with the present application). They did neither. As a result, to entertain this ground for review now would create the unseemly risk of inconsistent decisions on the very same issue. As the Federal Court of Appeal held in similar circumstances: "The state and stability of the law would be ill served if two potentially contradictory decisions were allowed to co-exist, one by this Court on judicial review of the initial decision and the other by the Board in reconsideration of that decision" (*Vidéotron Télécom Ltée v Communications, Energy and Paperworkers Union of Canada*, 2005 FCA 90 at para 13). The January 18, 2022, RAD decision

had to be attacked directly, if at all, not collaterally (*Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41 at para 20).

[37] Since the issue of ineffective assistance of counsel is not properly before the Court, this ground for review must be rejected.

B. *Is the RAD Decision Unreasonable?*

[38] The applicants contend that the RAD's refusal to admit some of the new evidence tendered on appeal is unreasonable. I do not agree.

[39] A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85). A decision that displays these qualities is entitled to deference from a reviewing court (*ibid.*). When applying the reasonableness standard, it is not the role of the reviewing court to reweigh or reassess the evidence considered by the decision maker or to interfere with factual findings unless there are exceptional circumstances (*Vavilov*, at para 125). To set aside a decision on the basis that it is unreasonable, the reviewing court must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov*, at para 100).

[40] The applicants do not contest the RAD's rejection of the community support evidence. They do contend, however, that the RAD unreasonably rejected the new evidence addressing the RPD's credibility concerns.

[41] The applicants have not persuaded me that there is any basis to interfere with the RAD's determination that the new evidence did not meet the requirements of subsection 110(4) of the *IRPA*. The RAD's reasons explaining why it so concluded are justified, transparent, and intelligible.

[42] The RAD's key finding in this regard was that the applicants' new evidence sought to address issues they knew were of concern to the RPD yet they did not even attempt to provide evidence to address those concerns before the RPD rendered its decision. For example, the RAD found that the applicants could have attempted to provide evidence to explain the irregularity in the signature on the June 24, 2019, affidavit from the principal applicant's brother before the RPD rejected their claims. The applicants knew this was a concern for the RPD and they were given an opportunity to provide post-hearing evidence on another matter. As the RAD observed: "Had the [applicants] wished to present evidence to explain the irregularities in the Affidavit, they could have applied to include such evidence with the other evidence that was submitted after the hearing." In view of this, the RAD's conclusion that the applicants had not established that they could not reasonably have been expected to present this new evidence earlier is altogether reasonable. The same is true of the other new evidence the RAD refused to admit.

[43] The applicants also submit that the RAD's adverse credibility findings, which align with the RPD's findings, are unreasonable. Once again, I am unable to agree. The RAD's reasons for finding that the RPD correctly concluded that the applicants' claims for protection were not supported by credible and trustworthy evidence bear all the hallmarks of reasonableness. The applicants have not identified any failures of rationality, misapprehensions of evidence, or other flaws that could call the reasonableness of the decision into question. Rather, their submissions effectively ask me to reweigh the evidence and reach a different conclusion than the RAD. For example, they contest the significance the RAD attributed to inconsistencies in the principal applicant's narrative for the principal applicant's credibility. The conclusions the RAD drew as to the materiality of the inconsistencies (e.g. concerning the timing of the sale of the school) and the absence of a credible explanation for those inconsistencies were reasonably open to it on the record. As set out above, it is not the role of a court conducting judicial review on a reasonableness standard to substitute its assessment of such matters for that of the administrative decision maker. The same holds for the RAD's findings concerning the documentary evidence on which the applicants relied.

[44] In short, the applicants have not established that the RAD's decision rejecting their claims for protection is unreasonable. This ground for review must also be rejected.

IV. CONCLUSION

[45] For these reasons, the application for judicial review will be dismissed.

[46] The parties did not propose any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that no question arises.

JUDGMENT IN IMM-7427-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7427-21
STYLE OF CAUSE:	ISBAT MOROLAYO EDU-ADESOKAN ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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