Federal Court Cour fédérale

**Date: 20221115**

**Docket: IMM-4093-21**

**Citation: 2022 FC 1559**

**Ottawa, Ontario, November 15, 2022**

**PRESENT: Madam Justice Sadrehashemi**

**BETWEEN:**

**OMOLARA NIMOTA ADESHINA**
**EMMANUAL BAMIDELE ADESHINA**
**MARY AYOMIDE ADESHINA**
**OLUWASEYI MARGARET ADESHINA**
**AND BAMIDELE EMMANUEL ADESHINA JR.**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] The Applicants are a family: Omolara Nimota Adeshina ("Ms. Adeshina") and her husband, Emmanuel Bamidele Adeshina ("Mr. Adeshina"), and their three minor children—two daughters and one son. The Applicants fear persecution in Nigeria from Mr. Adeshina's uncle

and other family members because they refuse to force their two daughters to undergo female genital mutilation ("FGM"). The Applicants also allege risk of persecution due to the stigma surrounding their second-born daughter's diagnosis of sickle cell anemia.

[2] The Applicants made a refugee claim in Canada upon arrival. The Applicants were represented by two counsel before the Refugee Protection Division [RPD]: one counsel filed their refugee claim forms and narrative and another prepared them for the RPD hearing and represented them at that hearing. The RPD dismissed the Applicants' refugee claims and found under subsection 107(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] that the Applicants' claim for protection had "no credible basis." This finding has significant consequences for the Applicants. Most critically, it precludes them from appealing the RPD's decision to the Refugee Appeal Division [RAD] (*IRPA*, s 110(2)(c)).

[3] The Applicants make two arguments on judicial review. First and principally, they argue there was a breach of natural justice because of the ineffective assistance of both of their counsel at the RPD. Because of this breach of natural justice, the Applicants argue that the RPD's decision ought to be set aside and the Applicants' claim ought to be redetermined. Second, they argue that the RPD unreasonably determined that there was "no credible basis" for their claim.

[4] On the first issue, the Applicants' allegations against their former counsel are vague, inconsistent, and unsupported. I find that they have not met the high threshold for establishing a breach of natural justice due to ineffective assistance of counsel. On the second issue, I find that the RPD unreasonably determined that there was no credible basis for the Applicants' claim

within the meaning of subsection 107(2) of *IRPA*. Specifically, the RPD unreasonably determined that there was no objective basis for the Applicants' FGM claim. As the objective basis for the FGM claim forms part of the RPD's overall assessment of the Applicants' claims for protection, including the two minor female children's claims, the appropriate remedy is to send the matter back to be redetermined.

[5] Based on the reasons below, I grant the judicial review.

## II. Background

[6] The Applicants are all citizens of Nigeria. The youngest child, Mr. and Ms. Adeshina's son, is also a citizen of the United States [the US]. The Applicants left Nigeria in 2015 and went to the US as visitors. They remained primarily in the US between 2015 and 2018. Between 2015 and 2017, Mr. Adeshina made numerous trips from the US to Nigeria. In 2017, the Applicants made a refugee claim in the US. There is no final determination on that claim as I understand the Applicants abandoned it prior to coming to Canada in March 2018.

[7] The Applicants made a refugee claim upon their arrival in Canada. In his statement to immigration officials at the border, Mr. Adeshina alleged that he feared return to Nigeria due to his political involvement with a Nigerian political party. The Applicants retained a lawyer to assist with their refugee claim [First Counsel].

[8] The Applicants filed their refugee claims forms, including their narrative, a few weeks after arriving. The Applicants' narrative repeated essentially the same basis of claim as Mr.

Adeshina had disclosed to immigration officials at the border: that Mr. Adeshina had worked as a ward coordinator for the All Progressives Congress, a Nigerian political party, and that over a number of years he was threatened with death due to his political activities. In their narrative, the Applicants also alleged fear of Mr. Adeshina's uncle who threatened to harm them if they do not force their daughters to undergo FGM.

[9] The Applicants retained new counsel [Second Counsel] prior to their refugee hearing before the RPD. The Second Counsel filed amended narratives prior to the refugee hearing and represented the Applicants at their refugee hearing. In the amended narratives, the Applicants admitted that their first narrative and Mr. Adeshina's statement about his political activity were false. The Applicants' amended narrative focuses only on the consequences they would face for not forcing their daughters to undergo FGM and the stigma the family faces due to their youngest daughter's diagnosis of sickle cell anemia.

[10] The RPD heard the Applicants' claim on February 8, 2021 and March 18, 2021. The RPD refused the claims in a decision dated April 19, 2021. The RPD found that the Applicants lacked credibility and discounted their corroborative documents. The RPD further found that there was no objective basis for the Applicants' claims about the consequences they would face for refusing to force their daughters to undergo FGM nor the stigma surrounding the sickle cell anemia diagnosis. The RPD found under subsection 107(2) of *IRPA* that the Applicants' claim for protection had "no credible basis."

## III. Issues and Standard of Review

[11] There are two issues in this judicial review: i) whether the ineffective assistance of the Applicants' former counsel in preparing the Applicants' refugee claim documents and preparing the Applicants for their refugee hearing caused a breach of nature justice; and ii) whether the RPD's no credible basis determination is reasonable.

[12] On the ineffective assistance of counsel issue, both parties agree that the general presumption of a reasonableness standard of review does not apply to procedural fairness issues (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23, 77). The question I need to ask is whether the procedure was fair in all the circumstances (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43*; Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54). On the second issue, the general presumption applies and I will review the RPD's determination on a reasonableness standard.

## IV. Analysis

### A. *Incompetence of Counsel*

[13] To establish a breach of natural justice due to ineffective assistance of counsel in immigration proceedings, this Court has held that an applicant must establish three components:

i. The representative's alleged acts or omissions constituted incompetence;

ii. There was a miscarriage of justice in the sense that, but for the alleged conduct, there is a reasonable probability that the result of the original hearing would have been different; and

iii. The representative was given notice and a reasonable opportunity to respond (*Guadron v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1092 at para 11*; R v GDB*, 2000 SCC 22 at para 26 [*GDB*]).

[14] There is no dispute between the parties that the third component of the test has been met. Both of the Applicants' former counsel were notified and given a reasonable opportunity to respond to the Applicants' allegations [Notice of Incompetence]. Both former counsel responded. As I will explain further below, there were deficiencies in how the allegations were put to the former counsel, in terms of the vagueness of the allegations and the inaccuracy of the details. I address this problem in the discussion on whether the Applicants established incompetence against either counsel.

[15] The Applicants bear the onus of establishing that their counsel's conduct fell outside the range of reasonable professional assistance. Incompetence is determined on a reasonableness standard with "a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance" (*GDB* at para 27).

[16] I find that the Applicants have not met their onus to establish that either former counsels' conduct constituted incompetence.

(1) Allegations Against Second Counsel

[17] In the Notice of Incompetence provided to the Applicants' Second Counsel, the Applicants list numerous allegations of incompetence. The Applicants do not, however, rely on many of those allegations in their arguments on judicial review. Indeed, some of the allegations seem misplaced and irrelevant to the Applicants' claims against the Second Counsel. For example, the Notice of Incompetence alleges that the Second Counsel "deserted [the Applicants] at a critical stage of their refugee claims," yet it does not further explain this assertion which is not supported by evidence in the record.

[18] In their written materials and at the judicial review hearing, the Applicants focused solely on the Second Counsel's decision to submit two sets of amendments to the RPD. The Applicants make three separate allegations in relation to this issue: i) that the Second Counsel amended the refugee claim without the Applicants' instructions; ii) that the Second Counsel made the amendments without first reviewing the file and the original narrative the Applicants filed with the RPD; and iii) that filing such amendments, even with instructions and after reviewing the file, is incompetent in and of itself because of the foreseeable consequences to a claimant's credibility.

[19] In response to the Notice of Incompetence, the Second Counsel provided a letter and an affidavit. The Second Counsel refuted the allegation that he made amendments without the Applicants' instructions. The Second Counsel provided as exhibits to his affidavit several email exchanges between himself and Mr. Adeshina. The Applicants have not disputed the accuracy of

this correspondence. A series of these exchanges took place in May 2019 prior to the submission of the first amendment. The second set of exchanges took place in November 2020, prior to the submission of the second amendment. Several emails attach various versions of the draft amendments, along with questions from Second Counsel requesting further information.

[20] The Applicants provided no submission in response to the Second Counsel's evidence. Having reviewed these documents, I do not see any basis for the allegation that the Second Counsel unilaterally submitted amendments without instructions.

[21] The second allegation, that the Second Counsel filed the amendments without viewing the file, is also without merit. There is a letter from the Second Counsel to the RPD dated April 2019 requesting the Applicants' full file. The RPD provided the file to the Second Counsel a few weeks later. The Second Counsel sent the first amendment to the RPD at the end of May 2019, after he received the RPD file.

[22] The third allegation rests on the premise that it is necessarily incompetent and not in a client's interests to file an amendment if the first narrative is false. I do not accept this premise. The Applicants have not demonstrated that the Second Counsel's decision to file an amendment was incompetent. The Applicants' current counsel explained that the appropriate approach is for the counsel to withdraw as counsel, to "take [the claim] out of the courts," or to ask the Applicants to get a third opinion. While there may be different appropriate strategies depending on the circumstances, there is no basis to find that the Second Counsel was incompetent for making an amendment in these circumstances.

[23] I am not satisfied, based on the evidence presented, that the Applicants have shown that their Second Counsel was incompetent.

(2) Allegations Against First Counsel

[24] The Applicants took a similar careless approach in setting out their allegations to their First Counsel. For example, the Applicants alleged that the First Counsel withdrew at a critical stage in the refugee claim but Mr. Adeshina states in his affidavit filed on judicial review: “given that we were not satisfied with the work done by [First Counsel] we hired a second lawyer.” Like the Notice of Incompetence provided to the Second Counsel, the Applicants do not rely on many of these allegations on judicial review. The key allegation the Applicants rely on is the level of assistance the First Counsel provided in preparing the Applicants’ refugee forms and narrative.

[25] The Applicants’ account has not been consistent. On judicial review, the Applicants allege that their First Counsel unilaterally submitted their refugee forms and narrative, without their review or instructions. During the Applicants’ RPD hearing, Mr. Adeshina first testified that the First Counsel had nothing to do with the Applicants’ narrative and that they completed it on their own. When asked how the narrative was faxed from their First Counsel’s office, Mr. Adeshina stated that the First Counsel’s secretary had written the Applicants’ narrative without their knowledge. Ms. Adeshina also testified that the Applicants had decided to write their refugee claim with the false information about Mr. Adeshina’s political involvement, which he provided immigration officials on arrival, based on the advice the Applicants had received from other refugee families at the YMCA.

[26] In her response to the Notice of Incompetence, the Applicants' First Counsel asserted that the Applicants drafted their own narrative and emailed it to her. The First Counsel provided this email in her response. The Applicants have taken no issue with the accuracy of this correspondence. The First Counsel also asserted that she met with the Applicants alone on the weekend before submitting the refugee forms and narrative, went through the narrative with them, and made corrections to the narrative prior to its submission. The First Counsel asserts in her response that the Applicants never indicated that the story they were presenting was false. I do not understand the Applicants to assert that they admitted their initial story was false to their First Counsel.

[27] Based on the evidence presented, I am not satisfied that the Applicants' allegation of incompetence against their First Counsel is supported by a "precise factual foundation" nor is "sufficiently specific and clearly supported by the evidence" (*Brown v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1305 at para 54; *Shirwa v Canada (Minister of Employment and Immigration)*, 1993 CanLII 3026 (FCA), [1994] 2 FC 51; *Vardalia v Canada (Minister of Citizenship and Immigration)*, 2022 FC 300 at para 40). Accordingly, the Applicants have not established that their First Counsel's conduct amounted to incompetence.

[28] Given that the Applicants have not met the first prong of the test in establishing that the conduct of either former counsel was incompetent, it is unnecessary to discuss the second prong (the prejudice component) of the test.

B. *No credible basis determination*

[29] The Applicants argued in their written memorandum that the RPD decision was unreasonable but did not provide arguments in support of this ground of review. At the judicial review hearing, in addition to the incompetence of counsel argument, counsel for the Applicants argued the decision was unreasonable because of the "no credible basis" determination and in particular the RPD's evaluation of objective evidence on the FGM-related risk. Applicants' counsel did not challenge particular credibility findings made by the RPD.

[30] Subsection 107(2) of *IRPA* provides that where the RPD determines that "there was no credible or trustworthy evidence on which it could have made a favourable decision, it shall state in its reasons for the decision that there is no credible basis for the claim." As noted above, this finding has serious consequences for a claimant. It bars a claimant from appealing the RPD's negative determination to the RAD (*IRPA*, s 110(2)(c)), which in turns deprives them of the right to a statutory stay of removal pending their appeal and judicial review of the negative RAD decision (*Immigration and Refugee Protection Regulations (SOR/2002-227),* s 231(1)).

[31] Given the statutory language in subsection 107(2) and the significant procedural rights that are affected by its application, the threshold for making a "no credible basis" finding is high (*Mahdi v Canada (Minister of Citizenship and Immigration)*, 2016 FC 218 at para 10); *Omaboe v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1135 at para 18).

[32] On the FGM claim, the RPD accepted that FGM continues to be widespread and is more common among Mr. Adeshina's ethnic group, the Yoruba people. But the RPD found no objective basis for the FGM claim because the "consequences for refusal for Yoruba parents do not involve threats to life or security." The RPD states that it came to this determination by weighing the evidence in the record before it, giving "full weight to the objective, reliable and reputable sources" and "little weight to the quoted newspaper articles indicating consequences to the life and safety of parents refusing FGM on their daughters."

[33] The RPD relied solely on its finding that there was no objective basis to the FGM claim to then find that some of the Applicants' corroborative evidence should be given no weight. The RPD found that letters from the Applicants' family members should be given no weight because these letters were inconsistent with its finding that there was no objective basis to the FGM claim.

[34] The Respondent argued that it was open to the RPD to weigh the evidence and to prefer some evidence over other evidence. That is certainly true but this approach does not support the RPD's determination that the claim has "no credible basis" under subsection 107(2). The RPD did not give no weight to the objective evidence that supported the Applicants' allegations; it gave this evidence "little weight" and determined it preferred other evidence. It was open to the RPD to do this. This weighing exercise is not, however, supportive of a finding that there is "no credible basis" to the claim. This Court has noted in several cases, a "no credible basis" determination cannot be based on "a summary of insufficiency and weighing of evidence pros and cons" (*Mohamed v Canada (Minister of Citizenship and Immigration)*, 2017 FC 598 at para

31; *Mahdi v Canada (Minister of Citizenship and Immigration)*, 2016 FC 218, at para 10; *Boztas v Canada (Citizenship and Immigration)*, 2016 FC 139 at paras 11-12). This is what the RPD did here. After reviewing the RPD's reasons and the objective evidence in the record, I find the RPD's determination that there was no objective basis to the FGM claim, and therefore "no credible basis" to the Applicants' claim to be unreasonable.

C. *Remedy*

[35] In a number of cases, this Court has sent back only the finding of "no credible basis" for redetermination by a different RPD member and found the RPD's decision otherwise reasonable (see for example *Omar v Canada (Minister of Citizenship and Immigration)*, 2017 FC 20 at paras 20-22; *Hadi v Canada (Minister of Citizenship and Immigration)*, 2018 FC 590 at para 55). As Justice Pallotta noted in addressing a similar issue in the context of manifestly unfounded claims, "a reviewing court may quash one aspect of a decision if that aspect is clearly excisable from the rest of the decision" (*Balyokwabwe v Canada (Minister of Citizenship and Immigration)*, 2020 FC 623 at para 64).

[36] In my view, the "no credible basis" determination is not clearly excisable from the decision. The "no credible basis" determination rested in part on a finding of no objective basis for the Applicants' FGM claim. The RPD relied solely on its finding that there was no objective basis to the FGM claim to give no weight to some of the Applicants' corroborative evidence in support of the FGM claim. The "no credible basis" determination is therefore intertwined into other parts of the reasoning. In these circumstances, the appropriate remedy is to send the whole matter back for redetermination.

[37] Neither party proposed a question for certification and I agree none arises.

**JUDGMENT IN IMM-4093-21**

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

1. The decision of the RPD, dated April 19, 2021, is set aside;

2. The matter is sent back to be redetermined by a differently constituted panel at the RPD; and

3. No serious question of general importance is certified.

"Lobat Sadrehashemi"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-4093-21 |
| **STYLE OF CAUSE:** | OMOLARA NIMOTA ADESHINA ET AL V THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | HELD BY VIDEOCONFERENCE |
| **DATE OF HEARING:** | APRIL 4, 2022 |
| **JUDGMENT AND REASONS:** | SADREHASHEMI J. |
| **DATED:** | NOVEMBER 15, 2022 |

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