

CANADA / JUDGMENT

Adebiyi v. Canada (Citizenship and Immigration)

2023 FC 901

COURT

Federal Court

DECIDED

28 June 2023

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20230628 Docket: IMM-7133-21 Citation: 2023 FC 901 Toronto, Ontario, June 28, 2023 PRESENT:

Madam Justice Go BETWEEN: ABIDEMI HALIMA ADEBIYI ASHRAF TOLUWALASE ADEBIYI Applicants and THE MINISTER OF CITIZENSHIP AND IMMIGRATION Respondent JUDGMENT AND REASONS I. Overview [1] The Applicants, Ms. Abidemi Halima Adebiyi [the “Principal Applicant” or “PA”] and her minor son, Ashraf, are citizens of Nigeria. In 2017, the family of the PA’s spouse informed the PA that Ashraf – who was around three years old at the time – would have to undergo protection rituals including scarification that could result in the permanent scarring of Ashraf’s face. Having experienced many difficulties after going through the same procedure herself as a young child, the PA refused to comply with the in-law’s demand, about which the PA’s spouse was ambivalent.

[2] Based on this refusal, the PA’s spouse’s family began to threaten that they would go ahead with the ritual with or without the PA, and attempted to take Ashraf from school to perform the rituals without the PA’s consent.

[3] The Applicants departed Nigeria and entered Canada in April 2018 to make their refugee claim. The PA’s spouse remains in Nigeria and agreed to let the Applicants leave so long as he could retain contact with Ashraf.

[4] The Refugee Protection Division [RPD] rejected the Applicants’ claim in February 2021 on the basis of a viable Internal Flight Alternative [IFA] in Abuja, Nigeria. In a decision dated September 16, 2021, the Refugee Appeal Division [RAD] upheld the RPD’s IFA finding and confirmed that they are neither 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] [Decision].

[5] The Applicants seek judicial review of the Decision. I grant the application as I find that the RAD breached procedural fairness by making a material finding based on the transcript of the RPD hearing [Transcript], which turned out to be an incomplete record of the RPD

hearing, and by failing to review the audio recording of the RPD hearing. II. Preliminary Issue [6] Sometime prior to the hearing, I drew the parties' attention to certain documents in the Certified Tribunal Record [CTR] that appear to belong to another refugee claimant unrelated to this application. Counsel for the Applicants confirmed that those documents were included by accident and should be redacted. The Respondent had no objection to the redaction, and I will so order. III. Issues and Standard of Review [7] The Applicants raise two issues before this Court, namely: Whether the RAD breached natural justice by relying on an incomplete transcript of the RPD hearing; and Whether the RAD's IFA analysis, including its assessment of the psychotherapist's report, was reasonable.

- [8] The determinative issue here is one of procedural fairness, which attracts a standard of review akin to correctness: *Canadian Association of Refugee Lawyers v Canada* (Immigration, Refugees and Citizenship), 2020 FCA 196 at para 35. The reviewing court's ultimate role is to determine whether the procedure was fair having regard to all of the circumstances: *Canadian Pacific Railway Company v Canada* (Attorney General), 2018 FCA 69 at para 54. IV. Analysis A. Did the RAD breach procedural fairness by relying on an incomplete transcript of the RPD hearing? [9] As part of her appeal, the PA submitted to the RAD an affidavit describing the difficulties she encountered during the RPD hearing. Specifically, the PA explained:
12. My laptop was not working so I listened from my lawyer's laptop which was with my lawyer in the office next to where I was. I also tried to provide my response through the same means. My lawyer's laptop was able to pick up my voice but I encountered problems hearing the questions clearly.
 13. Prior to my counsel's questioning me I informed her about the problems with my computer and we tried to resolve it but could not.
 14. I ended up with my lawyer's laptop and she used her second laptop that had no camera activated but which she was going to use to access the questions and submissions she prepared for my case.
- [10] Similarly, Applicants' counsel made reference in her appeal submissions to the issue with the PA's laptop and submitted that the RPD erred by failing to consider the technical difficulties experienced by the Applicants during the hearing which impacted the testimony of the PA.
- [11] The RAD found that the RPD did not err in relation to the technical difficulties experienced at the RPD hearing. Based on its review of the Transcript, the RAD concluded there was no indication that there were computer or technical issues as described by counsel. The RAD further found that if computer or technical issues were experienced, there was no indication that the RPD was made aware by the PA or counsel of such issues.

- [12] The Applicants argue that the RAD breached natural justice by not reviewing the complete transcript or the audio recording of the RPD hearing when rejecting the Applicants' argument on appeal that the RPD erred by failing to consider the impact of technical difficulties on the RPD hearing process.
- [13] Having reviewed the Transcript as contained in the CTR and having listened to the audio recording of the RPD hearing, I agree with the Applicants that the RAD erred by relying on the Transcript and failed to review the complete audio recording of the RPD hearing.
- [14] There are two audio recordings of the RPD hearing placed on file along with the CTR. The first recording lapsed 3 hours and 7 minutes, while the second lapsed 13 minutes and 54 seconds.
- [15] During the first recording, there were a number of exchanges among the RPD member, the PA's counsel and the PA about the difficulties that the PA was experiencing with her laptop. The Applicants point to the following exchange between counsel and the RPD member: Counsel: Her computer is not working there is no volume in it... she's been listening from my computer.... Member: ... no wonder there was times she did not hear me and she is...
- [16] I note also that after this exchange, the RPD member had to escalate the issue by calling in a staff member of the RPD to assist. The staff member worked with the PA and counsel for approximately 20 minutes. After the hearing resumed, the RPD member was unable to hear counsel, and had to call the staff member back to assist. At one point, the RPD member even suggested to counsel to keep moving her laptop back and forth between her and the PA as the laptop microphone could only pick up the voice of the person directly in front of the laptop. Eventually, the problem was "resolved" by counsel providing her laptop to the PA, while counsel continued to participate by audio only.
- [17] Disturbingly, none of these exchanges was reflected in the Transcript. Nor, might I add, did the Transcript include all of the counsel's submission, most notably counsel's submissions regarding the appropriateness of the IFA in view of the PA's psychological conditions.
- [18] At the hearing before me, the Respondent conceded that the RAD made a "factual error" when it failed to acknowledge that there were technical issues during the RPD hearing. However, the Respondent submitted that the obligation is on the Applicants to show that the technical difficulties are relevant to the determinative issue of the IFA. Specifically, the Respondent submitted that it is not for the Court to establish the link between the technical issues and the reasonableness of the Decision. It is up to the Applicants to demonstrate that the technical difficulties resulted in the RAD's failure to consider key aspects of the IFA test. In the absence of such link, the Respondent asserts that the Decision cannot be found unreasonable.
- [19] For the following three reasons, I reject the Respondent's arguments.

- [20] First, I disagree that the technical issues are only relevant if they are related to the RAD's IFA analysis. The RAD explained at para 13 of the Decision: I am guided by the jurisprudence of the Federal Court that indicates a viable IFA may be determinative of a claim under section 96 or 97. "Put simply, where an IFA is found, a claimant is not a refugee or a person in need of protection." For that reason, I have focused my analysis on the existence of a viable IFA, as shown below, and have not addressed the [Applicants'] arguments unrelated to IFA. The exception are arguments related to technical difficulties experienced during the hearing before the RPD on January 21, 2021. [Emphasis added]
- [21] It is clear from the RAD's own reasons that it did not regard the Applicants' arguments with respect to technical issues to be related to the IFA issue. As such, I reject the Respondent's contention that the Applicants must demonstrate a link between the technical issues and the RAD's IFA analysis in order to render the technical issues relevant.
- [22] Second, as the Applicants point out, and as the RAD acknowledged in the Decision, the role of the RAD member "is to look at all the evidence and decide if the RPD made the correct decision." The audio recording of the RPD hearing was included in the list of documents that made up the Applicants' appeal record before the RAD. As such, it formed part of the evidentiary record that the RAD member had a duty to consider: *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 103; *Rozas del Solar v Canada (Citizenship and Immigration)*, 2018 FC 1145 at para 124.
- [23] In this instance, the RAD clearly erred when it concluded that the RPD was not aware of the technical problems faced by the PA. On the contrary, not only was the RPD aware, the RPD member acknowledged that the PA might not have been able to hear her questions, yet opted to continue with the hearing. Such a glaring factual error on the part of the RAD calls into question whether or not the RAD in fact considered the audio recording of the hearing, and by extension, whether it properly discharged its duty by reviewing all the evidence in order to determine if the RPD made the correct decision.
- [24] Third, I agree with the Applicants that the RAD could have disposed of the Applicants' arguments by concluding that the technical difficulties would not have affected its Decision. It did not. Instead, the RAD chose to address the arguments with respect to the technical difficulties as a separate issue, which made the technical difficulties relevant. That being the case, it is not up to the Respondent to now demand that the Applicants demonstrate what impact these technical issues had on the Decision, or supplement the Decision by suggesting that these issues are not relevant to the RAD's IFA considerations.
- [25] As a final note, I want to emphasize the importance of having a full and complete evidentiary record for this Court to carry out its judicial review function. It is disconcerting to say the least that the Transcript came with a declaration by a RPD staff that it is "an accurate recording of the proceeding", while it was anything but. Both the RAD and the Court routinely rely on the accuracy of the RPD record to conduct their assessment of a decision with regard to a refugee claim. Having a transcript that fully and accurately reflects

the RPD proceeding is critical to maintaining the integrity of the refugee claim process by ensuring claimants have access to a meaningful appeal and judicial review process based on an accurate evidentiary record. Crucial omissions of the evidentiary record like those in this case could deprive a claimant's right to appeal and judicial review while undermining the public confidence in the refugee determination system.

- [26] In the case at bar, the RPD prepared an incomplete and inaccurate Transcript. The RAD then relied on the Transcript to make inaccurate factual findings, which led to its failure to consider the impact of the technical problems on the PA's ability to testify. The Applicants' right to procedural fairness was clearly breached and the Decision must be set aside. B. Whether the RAD conducted an unreasonable assessment of the IFA? [27] While my finding with respect to the procedural fairness issue is determinative of the application, I will offer a few obiter comments in order to provide further guidance to the RAD when the matter is returned for redetermination.
- [28] In support of her claim, the PA submitted a psychological report that describes her mental state resulting from past trauma and abuse, and from existing fear [Psychological Report]. Counsel also made submissions about the Psychological Report. The RPD did not mention the Psychological Report in its reasons. In their appeal to the RAD, the Applicants submitted that the RPD erred by ignoring the Psychological Report and counsel's submissions relating to the impact of the PA's psychological condition on the availability of an IFA. The RAD found that while the RPD erred in not considering the Psychological Report, that error was not fatal to the RPD's IFA analysis.
- [29] In their written submissions, the Applicants argue that the RAD erred by ignoring the evidence and submissions surrounding the PA's mental condition when assessing the reasonableness of the IFA under the second prong of the IFA test. The Applicants point to a Response to Information Request [RIR] regarding the availability of mental health services in Nigeria, which states among other things that "[t]he US Department of State's Country Report on Human Rights Practices for 2019 notes that mental health care services were almost nonexistent in Nigeria." The Applicants contend that the RIR demonstrates that access to and quality of mental health care are poor in Nigeria, and that the RAD's conclusions to the contrary undermined the impact of the Psychological Report on the reasonableness of the proposed IFA.
- [30] At the hearing, the Applicants added several new arguments, including that the statistics about available mental health treatment cited by the RAD allegedly came from a National Documentation Package [NDP] that did not exist. While the RAD member referenced in the footnote an NDP dated November 30, 2020, the evidence shows that the NDP consulted by the RAD was dated December 2021, which came about after the RPD hearing. Yet a review of the December 2021 NDP failed to reveal the very statistics cited by the RAD member in the Decision. The Applicants thus submitted that the RAD erred by relying on a non-existent document with non-existent statistics, while failing to bring to the attention of the Applicants the RAD's reliance on a new document that post-dated the hearing.

- [31] I will not address the Applicants' new arguments as they were raised for the first time at the hearing. However, these are legitimate concerns with regard to the transparency, intelligibility and justification of the Decision, as is the Applicants' argument that the RAD ignored evidence contained in the RIR. As such, I expect the Applicants' arguments with respect to the RAD's IFA analysis, as well as those regarding the technical issues, will be given due consideration upon redetermination. V. Conclusion [32] The application for judicial review is allowed.
- [33] The documents in the CTR relating to a third party shall be redacted.
- [34] There is no question to certify. JUDGMENT IN IMM-7133-21 THIS COURT'S JUDGMENT is that: The application for judicial review is granted. The decision under review is set aside and the matter referred back for redetermination by a different decision-maker. The Registrar shall redact pages 280 to 299 [PDF pages 283 to 302] of the Certified Tribunal Record before the public release of this decision. There is no question to certify. "Avvy Yao-Yao Go" Judge FEDERAL COURT SOLICITORS OF RECORD DOCKET: IMM-7133-21 STYLE OF CAUSE: ABIDEMI HALIMA ADEBIYI, ASHRAF TOLUWALASE ADEBIYI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION PLACE OF HEARING: Toronto, Ontario DATE OF HEARING: June 12, 2023 JUDGMENT AND REASONS: GO J. DATED: June 28, 2023 APPEARANCES: Stella Iriah Anaele For The Applicants Kevin Doyle For The Respondent SOLICITORS OF RECORD: Stella Iriah Anaele Barrister and Solicitor North York, Ontario For The Applicants Attorney General of Canada Toronto, Ontario For The Respondent

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