

Federal Court



Cour fédérale

Date: 20230718

Docket: IMM-3872-21

Citation: 2023 FC 979

Ottawa, Ontario, July 18, 2023

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

BELAY DERZA GAGA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT and REASONS

I. Overview

[1] The Immigration Division found the Applicant, Belay Derza Gaga, inadmissible to Canada for being a member of an organization that engaged in subversion by force of the Ethiopian government. Mr. Gaga is not challenging the Immigration Division’s finding that he was a member of the organization in question, the Oromo Liberation Front (“OLF”), nor that the OLF is an organization that had engaged in subversion by force of the Ethiopian government. The sole ground he raises on judicial review is the allegation that his two former counsel were incompetent.

[2] He argues that his first counsel failed to fully inform him of the consequences of admitting OLF membership when making his refugee claim and that his second counsel, who represented him at the Immigration Division, failed to raise his first counsel's incompetence at the hearing. Mr. Gaga argues that had he been fully informed of the consequences of admitting membership in the OLF in his refugee claim, other options would have been available to him, including not pursuing the claim at all.

[3] My decision turns on Mr. Gaga's claims regarding the incompetence of his second counsel. Mr. Gaga was required to raise the incompetence of his first counsel at the earliest practical opportunity, in this case, before the Immigration Division. Mr. Gaga argues his second counsel's incompetence prevented him from raising the first counsel's incompetence. I find the allegations of incompetence against Mr. Gaga's second counsel are without merit, and therefore Mr. Gaga's application must fail.

[4] Based on the reasons below, I dismiss the application for judicial review.

II. Procedural History

[5] Mr. Gaga is a citizen of Ethiopia. He arrived in Canada as a visitor in June 2018. The following month, he retained his first counsel and made a claim for refugee protection. In his claim, he alleged he feared persecution by the Ethiopian government who perceived him to be politically opposed to the government. His refugee narrative mentions his membership in the OLF and he listed the OLF in response to a question on the refugee claim forms about organizational memberships.

[6] Approximately two months after filing his refugee claim, the Canada Border Services Agency [CBSA] called Mr. Gaga in for an interview with a CBSA officer. The officer asked Mr. Gaga questions about his refugee claim and potential inadmissibility due to membership in the OLF. Mr. Gaga's first counsel was present for this interview.

[7] Approximately a year after his interview with the CBSA, in October 2019, Mr. Gaga was notified that his refugee claim was suspended and the CBSA was referring his case to the Immigration Division for a determination on admissibility because of his OLF membership.

[8] Approximately two months prior to his hearing, Mr. Gaga learned that his first counsel could no longer represent him because of serious criminal allegations relating to fraud in the counsel's refugee law practice. Mr. Gaga then retained his second counsel.

[9] Mr. Gaga's admissibility hearing at the Immigration Division took place in January 2021. Mr. Gaga testified at the hearing and his counsel argued that his membership in the OLF was the result of duress. The Immigration Division did not accept this argument. It found Mr. Gaga inadmissible under paragraph 34(1)(f) of the *Immigration and Refugee Protection Act* because he was a member of the OLF, an organization which the Immigration Division found there are reasonable grounds to believe engages in subversion by force of a government.

[10] Mr. Gaga first raised allegations of incompetence about both his former counsel in these judicial review proceedings. He provided notice to both former counsel in accordance with the Court's practice guidance *Re: Allegations Against Counsel or Other Authorized Representative*

in Citizenship, Immigration and Protected Person Cases before the Federal Court. Both counsel provided responses to the incompetence allegations.

[11] I note that the Court received Mr. Gaga's second counsel's affidavit responding to the allegations just prior to the judicial review hearing and accepted it for filing on consent of both parties. Mr. Gaga's counsel did not wish to adjourn the proceedings to provide any further response.

III. Issue and Standard of Review

[12] The overarching question on judicial review is whether it would be a miscarriage of justice to allow the Immigration Division's determination to stand considering the incompetence of counsel allegations. This is a procedural fairness question. 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).

[13] For incompetence of counsel to amount to a breach of procedural fairness, an applicant must show that (i) the former counsel's acts or omissions constituted incompetence; (ii) but for the alleged incompetence, there is a reasonable probability the result would have been different; and (iii) the former counsel was given a reasonable opportunity to respond (*R v GDB*, 2000 SCC 22 at para 26).

[14] There were a number of challenging sub-issues the parties substantively addressed that I need not determine, including whether Mr. Gaga established that his first counsel was incompetent, and whether there is a reasonable probability that because of his counsels' incompetence, the hearing outcome would have been different (which is the prejudice component of the ineffective assistance of counsel test). My decision turns on whether Mr. Gaga has shown that his second counsel's acts or omissions constitute incompetence.

[15] Mr. Gaga was required to raise his procedural fairness concerns about his first counsel's incompetence before the Immigration Division. (*Hennessey v Canada*, 2016 FCA 180 at para 20). I do not accept that his failure to do so was because of his second counsel's incompetence, as I explain below. Given that Mr. Gaga did not provide an adequate reason for failing to raise his concerns about his first counsel's competence before the Immigration Division, he is barred from raising it on judicial review. Accordingly, the only question I address in my reasons is whether Mr. Gaga has shown that his second counsel was incompetent.

IV. Incompetence Allegations against Second Counsel

[16] Mr. Gaga has not satisfied me that his second counsel's representation fell outside the range of reasonable professional assistance and constituted incompetence. Mr. Gaga argues that his second counsel was incompetent because she failed to raise his first counsel's incompetence before the Immigration Division and did not seek to amend his refugee narrative. Mr. Gaga's evidence on his communication with his second counsel is vague; he did not dispute his second counsel's recollection of their communications, which does not support an incompetence finding.

[17] Mr. Gaga provided an affidavit on judicial review that described his complaint about his second counsel's conduct. He asserts that he "had hopes that she might raise the problems regarding [his first counsel's] inadequate representation and amend [his] refugee claim. However, [the second counsel] continued the claim as it was and submitted country condition documents related to the OLF without any reference to [the first counsel]."

[18] Mr. Gaga does not explain what it is that he had "hoped" his second counsel would raise. He does not describe the "problems" he was hoping that she would address before the Immigration Division, other than she should have noted generally that the first counsel was incompetent. Mr. Gaga's evidence lacks details about these key issues. For example, the evidence does not explain: i) whether Mr. Gaga told his second counsel that he was not fully informed about the consequences of admitting membership in the OLF; ii) whether he told his second counsel that he wanted to raise his first counsel's incompetence; iii) whether he expressed a desire to amend anything in his refugee narrative; iv) whether there were inaccurate statements in his refugee narrative or his interview with CBSA that he wished to correct; and iv) whether he expressed any desire to withdraw his claim. Mr. Gaga does not provide any evidence about these key issues that form the basis of his incompetence allegations. I also note that Mr. Gaga has not explained the type of amendment he would expect his second counsel to make in these circumstances. He has not argued that he provided inaccurate information, with the assistance of his first counsel, in his refugee narrative or at his interview with CBSA.

[19] Mr. Gaga has not provided any evidence disputing his second counsel's recollection of their interactions and his affidavit does not contradict her evidence. Mr. Gaga's second counsel

explains in her affidavit that she directly asked Mr. Gaga whether he had concerns with his first counsel's representation. She recalls that Mr. Gaga stated that he had no concerns and that he would have remained with his first counsel had that counsel continued practicing law. She also noted that since she was aware of the allegations against Mr. Gaga's first counsel she questioned Mr. Gaga about the information in his refugee claim forms and narrative and was satisfied Mr. Gaga gave consistent answers. She did not have concerns of fabrication or misrepresentation.

[20] Mr. Gaga bears 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). Based on the evidence in this judicial review, I do not find that Mr. Gaga has established that his second counsel's conduct was incompetent.

V. Disposition

[21] The application for judicial review is dismissed. Neither party raised a question for certification and I agree none arises.

THIS COURT'S JUDGMENT IS THAT:

1. The application for judicial review is dismissed; and
2. No serious question of general importance is certified.

"Lobat Sadrehashemi"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3872-21

STYLE OF CAUSE: BELAY DERZA GAGA v THE MINISTER OF
PUBLIC SAFETY AND EMERGENCY
PREPAREDNESS

PLACE OF HEARING: HELD BY WAY OF VIDEOCONFERENCE

DATE OF HEARING: FEBRUARY 9, 2023

JUDGMENT AND REASONS: SADREHASHEMI J.

DATED: JULY 18, 2023

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