

Federal Court



Cour fédérale

Date: 20240822

Docket: IMM-2094-23

Citation: 2024 FC 1306

Ottawa, Ontario, August 22, 2024

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

SAHEED ADEYEMI ETTU

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Saheed Adeyemi Ettu is a citizen of Nigeria. He seeks judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board [IRB]. The RAD confirmed the determination of the Refugee Protection Division [RPD] of the IRB that Mr. Ettu is neither a Convention refugee nor a person in need of protection.

[2] For the reasons that follow, the RAD's decision was procedurally fair and reasonable. The application for judicial review is dismissed.

II. Background

[3] Mr. Ettu came to Canada in July 2017 to pursue a post-graduate program in Information System Business Analysis at George Brown College. His wife remained in Lagos with their children.

[4] Mr. Ettu's wife was a prosecutor with the Economic and Financial Crimes Commission in Nigeria. In May 2017, she began to experience harassment by members of a cult known as the Supreme Eiyé Confraternity. She had previously prosecuted a cult member on fraud charges. She said that unknown men attempted to bribe her, she was followed by unknown vehicles, and threatening letters were left on her vehicle.

[5] In December 2018, Mr. Ettu's wife and children left Nigeria for Canada. The family sought protection as refugees.

[6] The RPD dismissed the family's refugee claim, finding that they had a viable internal flight alternative in Port Harcourt. The family appealed the RPD's ruling to the RAD. Mr. Ettu's appeal was filed separately, because he and his wife had become estranged.

[7] The RAD upheld the RPD's decision but did not address Mr. Ettu's risks separately from those of his wife and children. Mr. Ettu sought leave and judicial review of the RAD's decision.

The application was allowed on consent, and Mr. Ettu's claim was remitted to the RAD for re-determination.

[8] In or about December 2020, Mr. Ettu's wife initiated proceedings in the Ontario Court of Justice for custody of the children, child support, spousal support, and other relief. Mr. Ettu notes that neither he nor his wife commenced any proceedings in the Nigerian courts.

[9] Although he lives separately from his wife and children, Mr. Ettu says this does not mean that the relationship has ended. He acknowledges that he is currently estranged from his wife; however, neither of them has initiated divorce proceedings in any court and he says there is a chance of reconciliation.

[10] Mr. Ettu alleges that his separation from his wife has not been publicized in Nigeria, and the Supreme Eiyé Confraternity continues to regard him as part of his wife's family. He therefore maintains that he still has a well-founded fear of persecution if he returns to Nigeria.

III. Decision under Review

[11] In January 2023, a second panel of the RAD again dismissed Mr. Ettu's claim. The RAD made the following findings:

- (a) Mr. Ettu's allegations of risk were based solely on the risks identified by his estranged wife in her Basis of Claim form and narrative;

- (b) the evidence established that the couple had been separated since October of 2019, and had been estranged for more than three years;
- (c) Mr. Ettu's wife had initiated proceedings in the Ontario Superior Court for custody of the children and support;
- (d) Mr. Ettu indicated that his relationship status was "separated" on his 2019 tax return;
- (e) following the RPD's rejection of the family's refugee claim, Mr. Ettu's wife and children pursued their appeal to the RAD without him;
- (f) Mr. Ettu's insistence that the couple might reconcile was speculative – the RAD based its decision on the status of his relationship at the time of the redetermination, and his forward-looking risk should he return to Nigeria;
- (g) while the agents of persecution had visited Mr. Ettu's previous residence in Nigeria, he was not present at the time, nor was he involved in any of the incidents of harassment involving his wife;
- (h) there was insufficient evidence to demonstrate that the agents of persecution would try to locate Mr. Ettu if he returned to Nigeria alone after a five-year absence;

- (i) on a balance of probabilities, the evidence did not establish that Mr. Ettu remained a member of his estranged wife's family, and he would therefore not be a target of the Supreme Eiyé Confraternity cult – Mr. Ettu left Nigeria for Canada before his estranged wife took any of the threats seriously, and there was no evidence that the cult was aware of what Mr. Ettu looks like; and

- (j) Mr. Ettu's estranged wife was the primary target of the agents of persecution, and he would not be at risk should he return to Nigeria without her – on a balance of probabilities, Mr. Ettu would not face a risk to his life or be subjected to cruel or unusual treatment or punishment if he returned to Nigeria.

III. Issues

[12] This application for judicial review raises the following issues:

- A. Was the RAD's decision procedurally fair?

- B. Was the RAD's decision reasonable?

IV. Analysis

[13] The RAD's decision is subject to review by this Court against the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] at para 10). The Court will intervene only where “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).

[14] The criteria of “justification, intelligibility and transparency” are met if the reasons allow the Court to understand why the decision was made, and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law (*Vavilov* at paras 85-86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[15] Procedural fairness is subject to a reviewing exercise best reflected in the correctness standard, although strictly speaking no standard of review is being applied (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54). The ultimate question is whether an applicant had a full and fair chance to be heard (*Siffort v Canada (Citizenship and Immigration)*, 2020 FC 351 at para 18).

A. *Was the RAD’s decision procedurally fair?*

[16] Mr. Ettu argues that the RAD breached his right to procedural fairness in two respects: it improperly rejected his credibility without convening an oral hearing, and it dismissed his claim based on its consideration of a new issue without giving him notice or an opportunity to respond.

[17] I disagree that the RAD rejected Mr. Ettu’s credibility. The RAD did not dispute Mr. Ettu’s subjective belief that he continues to be regarded by the Supreme Eije Confraternity as a member of his wife’s family, and he remains at risk if he returns to Nigeria. Rather, the RAD found that his subjective belief was not sufficiently supported by the evidence to meet the

requisite burden of proof. As Justice Denis Gascon held in *Garces Canga v Canada (Citizenship and Immigration)*, 2020 FC 749 (at para 41):

[...] Where the analysis identifies gaps in the evidence, it is up to the trier of fact to determine whether the claimant has met the burden of proof. In doing so, the trier of fact does not question the claimant's credibility. Rather, the trier of fact seeks to determine, assuming the evidence presented is credible, whether it is sufficient to establish, on a balance of probabilities, the facts alleged [...]

[18] The RAD made an explicit finding that the new evidence it admitted on appeal did not give rise to any concerns respecting Mr. Ettu's credibility (at para 17). The RAD was therefore not obliged to convene an oral hearing pursuant to s 110(6) of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[19] Mr. Ettu also argues that the RAD improperly rejected his claim based on its consideration of a new issue without giving him notice or an opportunity to respond. He says the RAD found he had failed to establish a *sur place* claim. However, this was never the basis of his claim for protection.

[20] Mr. Ettu relies on the following excerpt from the RAD's decision (at para 24):

SUMMARY

I find, on a balance of probabilities, that the evidence does not establish that the Appellant remains a member of ZE's family and therefore is no longer would not be a target of the Eiyé Cult. In reaching this conclusion, I note that the Appellant left Nigeria for Canada before ZE took any of the threats seriously. There is no evidence before me that the cult was aware of the Appellant or what he looks like. I find that the Appellant's estranged wife, ZE, is the primary target of the agents of persecution and I am not

persuaded by the Appellant's argument that he would be at risk should he return on his own to Nigeria without her. I find, on a balance of probabilities, that the Appellant would not face a risk to his life or be subjected to cruel or unusual treatment or punishment should he return to Nigeria.

[21] A claimant may become a *sur place* refugee after fleeing his country of origin "as a result of his own actions, such as associating with refugees already recognized, or expressing his political views in his country of residence" (Office of the UN High Commissioner for Refugees, Handbook on the Procedures and Criteria for Determining Refugee Status, para 96).

[22] The RAD found that Mr. Ettu left Nigeria for Canada before his wife took any of the threats seriously, and there was no evidence that the cult was aware of Mr. Ettu or what he looks like. The fact that the threats materialized after Mr. Ettu had left Nigeria did not transform his request for refugee protection into a *sur place* claim, and there is nothing to suggest that the RAD treated it as such. The term "*sur place*" does not appear in the RAD's decision. The RAD determined Mr. Ettu's refugee claim based only on the evidence of the risks that he presented.

[23] The RAD's decision was procedurally fair.

B. *Was the RAD's decision reasonable?*

[24] Mr. Ettu argues that the RAD's finding that he was no longer a member of his wife's family, and would not be perceived as such if he returns to Nigeria, was speculative and therefore unreasonable. I disagree.

[25] The RAD provided ample justification for its conclusion that Mr. Ettu was no longer a member of his wife's family. The couple had been separated since October of 2019, and had been estranged for more than three years. Mr. Ettu's wife had initiated proceedings in the Ontario Superior Court for custody of the children and support. On his 2019 tax return, Mr. Ettu indicated that his relationship status was "separated". Following the RPD's rejection of the family's refugee claim, Mr. Ettu's wife and children pursued their appeal to the RAD without him.

[26] The RAD reasonably based its decision on the status of Mr. Ettu's relationship with his wife at the time of the redetermination, and his forward-looking risk should he return to Nigeria. Mr. Ettu left Nigeria for Canada before his estranged wife took any of the threats seriously, and there was no evidence that the cult was aware of what Mr. Ettu looks like.

VI. Conclusion

[27] The application for judicial review is dismissed. Neither party proposed that a question be certified for appeal.

V. Conduct of this Proceeding

[28] This application for judicial review was heard by videoconference on March 5, 2024 before a judge who retired from the Court on June 1, 2024. By Order of the Chief Justice dated June 25, 2024, the application was reassigned to a different judge. During a case management

conference on June 28, 2024, the parties agreed that the application would be determined based on the written record and audio recording of the hearing.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

“Simon Fothergill”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2094-23

STYLE OF CAUSE: SAHEED ADEYEMI ETTU v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: BY VIDEOCONFERENCE

DATE OF HEARING: MARCH 5, 2024

JUDGMENT AND REASONS: FOTHERGILL J.

DATED: AUGUST 22, 2024

APPEARANCES:

Jagdeep S. Dhaliwal FOR THE APPLICANT

Jake Boughs FOR THE RESPONDENT

SOLICITORS OF RECORD:

Dhaliwal & Dhaliwal LLP FOR THE APPLICANT
Barristers and Solicitors
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario