Federal Court  Cour fédérale

Date: 20180411

Docket: IMM-3108-17

Citation: 2018 FC 388

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, April 11, 2018

Present: The Honourable Mr. Justice LeBlanc

BETWEEN:

OUMAR HAMID HAGGAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The applicant is seeking judicial review of a decision by the Immigration and Refugee Board's Refugee Appeal Division [RAD], dated June 21, 2017, dismissing his appeal of a decision by the Refugee Protection Division [RPD], finding that he is neither a Convention

refugee nor a person in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] The applicant is a citizen of the Republic of Chad. He arrived in Canada on September 1, 2015, and claimed refugee protection a few months later, in late January 2016. He alleges that he fears the authorities in his country because, on March 9, 2015, when he was a student at the University of N'Djamena and an advisory member of the student union, he participated in a student demonstration against the government's failure to pay scholarships. In particular, he fears being arrested by the police, like many other students who participated in the demonstration, which was brutally suppressed by the authorities. That is the reason he allegedly sought refuge in another city just a few days after the demonstration and why he reportedly left Chad for Canada on September 1, 2015.

[3] The RPD did not believe his story. In particular, it did not believe that he had held an administrative role on the student union or participated in the demonstration on March 9, 2015, because he was unable to provide details on the role that he allegedly played in the union or to identify the primary purpose of the demonstration, which, in the RPD's opinion, was not related to the failure to pay scholarships, but rather to the government's decision to make it mandatory for motorcyclists to wear helmets or, in the alternative, to identify the correct period of arrears in the failure to pay scholarships. The RPD noted that, according to the documentary evidence, the demonstration against the failure to pay scholarships took place in August 2015.

[4] The RAD did not want to intervene. First, it rejected the applicant's argument that he did not benefit, procedurally, from a fair hearing before the RPD because of the poor quality of the interpretation. Second, it found that the RPD had not erred in finding that the applicant's testimony was devoid of credibility regarding important elements of his refugee claim. Lastly, the RAD found that the fact that the RPD member who decided on the applicant's refugee claim had also heard his half-brother's claim did not raise a reasonable apprehension of bias.

[5] Prior to that, the RAD considered the applicant's request to introduce new evidence on appeal. It allowed that request in part. More specifically, it accepted the filing of a document issued by Chad's National Security Agency, dated April 4, 2016 [the Circular], demanding his arrest, and of letters from the applicant's uncle and brother, dated April 10 and 19, 2017, respectively, suggesting that the applicant is still wanted by the police. In his letter, the uncle alleges that the Chad secret police had questioned him a few times about the applicant's whereabouts. The brother's letter refers to what the uncle had allegedly told him about this.

[6] The RAD refused the filing of a card from the National Union of Chadian Students issued in the applicant's name for the 2014–2015 academic year, a letter from the president of the Communauté Tchadienne de l'Ontario [Chadian community of Ontario], dated April 22, 2017, and a letter from the president of the National Council of Chadian Recovery, dated April 11, 2017, on the grounds that this new evidence, in the case of the two letters, did not add anything to what had already been submitted into evidence or, in the case of the student card, did not concern a fact that occurred after the refugee claim was denied.

[7] The RAD also decided to hold a hearing. In a notice dated May 2, 2017, it notified the applicant that the hearing would concern how the Circular had been obtained, its authenticity, the reliability of the information it contains and its probative value in light of the documentary evidence. That notice also stated that the hearing could address any other issue raised by the applicant's testimony at the hearing. The RAD gave no weight to this new evidence, finding that it was a false document. As for the letters from the applicant's uncle and brother, it considered them to be insufficient to overcome the credibility issues identified by the RPD and the repercussions associated with filing a false document.

[8] The applicant submits that the RAD erred in three ways: first, by not allowing all of the new evidence to be filed; second, by rejecting the argument based on the inadequate interpretation before the RPD; and, third, by failing to consider the applicant's testimony at the hearing held before it on topics it broached, in particular with regard to the primary purpose of the demonstration on March 9, 2015.

II. Issue and standard of review

[9] The issue here is to determine whether the RAD committed a reviewable error within the meaning of subsection 18.1(4) of the *Federal Courts Act*, RSC, 1985, c F-7:

a. By not allowing all the new evidence to be filed;

b. By rejecting the argument based on the inadequate interpretation of the applicant's testimony before the RPD; and

c. By failing to consider the applicant's testimony at the hearing held before it in response to the questions about the purpose of the demonstration on March 9, 2015.

[10] It is not disputed that the issues concerning the admissibility of the new evidence and the merit of the RAD's decision regarding the RPD's findings on the applicant's credibility are subject to the reasonableness standard of review (*Canada (Citizenship and Immigration) v. Singh*, 2016 FCA 96, at paragraph 23 [*Singh*]; *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, at paragraph 35 [*Huruglica*]; *Paye v. Canada (Citizenship and Immigration)*, 2017 FC 685, at paragraph 3; *Nazari v. Canada (Citizenship and Immigration)*, 2017 FC 561, at paragraph 12; *Gu v. Canada (Citizenship and Immigration)*, 2017 FC 543, at paragraph 20; *Singh v. Canada (Citizenship and Immigration)*, 2017 FC 719, at paragraph 9). A decision of which the merit is being disputed will be reasonable if the underlying findings of fact, law or of mixed fact and law fall within a range of "possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paragraph 47 [*Dunsmuir*]). This is a deferential standard.

[11] As for the issue regarding the quality of the interpretation, which involves the rules of procedural fairness, it is also not disputed that the correctness standard applies (*Yousif v. Canada (Citizenship and Immigration)*, 2013 FC 753, at paragraph 17 [*Yousif*]; *Siddiqui v. Canada (Citizenship and Immigration)*, 2015 FC 1028, at paragraph 38 [*Siddiqui*]). This means that, if the administrative decision-maker erred, the Court will intervene without having to show deference to that decision-maker (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at paragraph 72).

III. Analysis

A. *The new evidence*

[12] The applicant has not convinced me that there is any reason to intervene.

[13] According to subsection 110(4) of the Act, the applicant could submit before the RAD only evidence that:

a. arose after the rejection of his claim;

b. was not reasonably available; or

c. was reasonably available but that he could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

(See also: *Singh*, at paragraph 34)

[14] In *Singh*, the Federal Court of Appeal held that one should not lose sight of the fact that subsection 110(4) of the Act "departs from the general principle according to which the RAD proceeds without a hearing, on the basis of the RPD's record (s. 110(3)) and must for that reason be narrowly interpreted" (*Singh*, at paragraph 35). It also held that, for the purposes of that provision, the implicit criteria identified in *Raza v. Canada (Citizenship and Immigration)*, 2007 FCA 385 [*Raza*], were applicable (*Singh*, at paragraph 49). Based on those criteria, to be admissible, the new evidence must be credible, relevant, new and material (*Singh*, at paragraph 38).

[15] The Federal Court of Appeal also rejected the point of view that a strict interpretation of subsection 110(4) would limit a refugee claimant's ability to access a full fact-based appeal, which, according to that point of view, would go against the wishes expressed by a former Minister of Citizenship and Immigration in a statement made in the House in March 2012 (*Singh*, at paragraphs 52–53).

[16] The applicant submits that the RAD erred in refusing to allow his student card to be filed on the ground that it apparently failed to consider that the card had been lost and later found. It is true that there is no indication that the RAD considered this argument to explain the late filing of this document. However, I do not consider that error to be determinative, since the RAD's findings regarding the applicant's credibility are based more on the contradictions between the applicant's allegations and the documentary evidence about the purposes of the demonstration on March 9, 2015, and on the presentation of the Circular, which the RAD ultimately deemed to be a forgery, than to the question of whether or not the applicant was involved with the student union.

[17] With respect to the letters from the president of the Chadian community of Ontario and from the president of the National Council of Chadian Recovery, the applicant submits that the RAD erred in not attributing any newness to them, when they refer to the fact that he is of Zakhawa ethnicity, whose members are persecuted, threatened, and imprisoned without judgment by the authorities when they dare to protest against the government in power. He is essentially arguing that the RAD's reasons on this point are not supported. This argument must fail.

[18] As the Supreme Court noted in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland Nurses*], an administrative decision-maker's reasons need not refer to all the arguments, statutory provisions, jurisprudence or other details that the reviewing judge would have preferred. The *Dunsmuir* criteria are met "if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland Nurses*, at paragraph 16). It also notes that the reasons do not have to be perfect or comprehensive, instructing the reviewing court that "the result is to be looked at in the context of the evidence, the parties' submissions and the process" (*Newfoundland Nurses*, at paragraph 18).

[19] In my opinion, the reasons cited by the RAD to refuse to allow those two letters to be filed are sufficient, on the basis of that jurisprudence. They make it possible to understand the basis of the RAD's decision on this point. In fact, it is appropriate to ask why that evidence could not have been filed before the refugee claim was denied and how it would resolve the credibility issues the RAD identified. The applicant provides no explanation in his memorandum.

[20] In short, had there been no demonstration on March 9, 2015, and were he not wanted by the police, as both the RAD and the RPD believed, the fact that the applicant is of Zakhawa ethnicity would ultimately have no effect on the merit of his refugee claim. In other words, I find it difficult to imagine, under the circumstances, that the claim "probably would have succeeded" if the RAD had considered this fact (*Raza*, at paragraph 13; *Singh*, at paragraph 38).

B. Interpretation at the hearing before the RPD

[21] The applicant argues that the interpreter who was on duty during the hearing before the RPD had difficulty understanding his answers, occasionally to the point of admitting to not understanding what he was saying. He argues that these problems were apparent throughout the hearing and states that he provided the RAD with several examples. He submits that the situation was exacerbated by the fact that the interpreter participated in the hearing by video-conference. He reports that the questions and answers had to be repeated on several occasions, which made it difficult and frustrating to communicate.

[22] It is well-established that interpretation, when it is required by a refugee claimant, must be "precise, continuous, competent, impartial and contemporaneous". However, it does not have to be perfect (*Singh v. Canada (Citizenship and Immigration)*, 2010 FC 1161, at paragraph 3). It is also settled law that there is no need to establish a prejudice in order for a refugee claimant to prove that inadequate interpretation resulted in a breach of procedural fairness. However, for the Court to intervene, the claimant must be able to demonstrate that the interpretation problem was material to the RPD's decision (*Yousif*, at paragraph 45). The problem must therefore be serious and non-trivial (*Siddiqui*, at paragraph 72) and must affect "a central aspect of the RPD's conclusions" (*Thsunza v. Canada (Citizenship and Immigration)*, 2014 FC 1150, at paragraph 41).

[23] That was not demonstrated. For one, as the respondent points out, the lack of an affidavit from the applicant to corroborate the interpretation problems that allegedly influenced the RPD's

decision does not help his case. In *Muntean v. Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No. 1449, 103 FTR 12, the Court reiterated the importance for an applicant in an immigration case to swear an affidavit in support of the application for judicial review:

> [11] The affidavit supporting the application for judicial review is one of the primary sources of information in immigration matters. It is from this material that the Court is given its first insight into the applicant's perception of the decision-making process to which he or she has been subjected. Accordingly, it is critical that the affidavit be sworn by the person who has personal knowledge of the decision-making process; usually, this is the applicant him or herself.

[24] Although the absence of such an affidavit is not fatal in all circumstances, it is in this case, at the very least with respect to the argument based on the inadequacy of the interpretation, because the Court is thus deprived of the evidence it would have required to determine whether the alleged deficiencies might have been material to the RPD's decision, in that they affected a central aspect.

[25] Regardless, I see nothing in the RAD's treatment of this argument that could justify this Court's intervention. The RAD carefully examined this argument. It noted the specific problems that the applicant brought to its attention, correctly summarized the applicable legal principles and listened to the recording of the hearing before the RPD. It conceded that there were some interpretation problems, often related to the speed and volume of the applicant's speech, but was unable to conclude that they resulted in a breach of the rules of procedural fairness, finding that the difficulties expressed by the interpreter instead seemed to indicate a genuine effort to provide an accurate interpretation.

[26] Acknowledging that the interpretation had not been perfect, the RAD correctly pointed out, as noted above, that this is not the standard required by the jurisprudence. It also pointed out, again correctly, that objections about the quality of the interpretation must be presented at the first opportunity. It noted in this regard that neither the applicant nor his counsel had intervened at the hearing to indicate their dissatisfaction with the quality of the interpretation, reiterating that it was actually the interpreter who occasionally raised some concerns. I find no error by the RAD on these two issues.

[27] The applicant submits in his memorandum that the RPD should have, on its own initiative, raised and resolved the interpretation problem from the outset and that he therefore cannot be blamed for not having expressed his concerns at the first opportunity. In support of this submission, he cites this Court's judgment in *Chen v. Canada (Minister of Citizenship and Immigration)*, docket IMM-951-00. In that case, the hearing transcript "clearly reveal[ed] that, at the beginning of the hearing, there was a serious problem in the communications between the applicant and the interpreter" (*Chen*, at paragraph 12) [emphasis added]. I simply do not have that evidence before me.

[28] In short, despite the occasional difficulties the interpreter encountered, I see nothing in the record to support a finding that the applicant was unable to understand the questions that he was asked and to make himself adequately understood in his answers and that he was thus deprived of the procedural protections he was entitled to receive.

[29] Consequently, this argument is dismissed.

C. The applicant's testimony before the RAD

[30] As indicated above, the applicant submits that the RAD erred by failing to consider his testimony before it, particularly in connection with the purpose of the demonstration on March 9, 2015, a subject that the RAD addressed even though it was not listed in the notice issued in preparation for the hearing. Therefore, if I correctly understand the applicant's argument, even though that evidence was outside the scope of the appeal, the RAD could not ignore it because it was the RAD that requested it.

[31] According to the applicant, that evidence shows that, at the time of the demonstration on March 9, 2015, Chad was experiencing a period of intense instability: the professors were on strike and the students were protesting a number of government measures, including the failure to pay their scholarships. He submits that it is therefore clear that one of the reasons for those demonstrations was the arrears in student scholarships, as he alleges to have also told the RPD.

[32] The first problem with this argument is the fact that the Court does not have access to the relevant part of the transcript of the RAD hearing, i.e. the part where he reportedly gave this testimony. It also does not have an affidavit from the applicant recounting this part of the RAD hearing. The Court must rely on the additional written submissions filed by counsel for the applicant in the days following that hearing. It does not have the benefit of knowing what was actually said and what occurred before the RAD. Once again, in such circumstances, it appears to me that, at the very least, an affidavit from the applicant was essential. Considering that the

burden is on the applicant to persuade me that the RAD erred in this regard, I consider the lack of any evidence to support this argument to be fatal.

[33] In any event, I note that the RAD, at paragraph 71 of its decision, states that it considered the applicant's testimony before it. It is presumed to have examined all the evidence before it and was not required to refer to each piece of evidence in its decision (*Kaisar v. Canada (Citizenship and Immigration)*, 2017 FC 789, at paragraph 23; *Kanagendren v. Canada (Citizenship and Immigration)*, 2015 FCA 86, at paragraph 36; *Newfoundland Nurses*, at paragraph 16). The lack of any evidence on this part of the hearing before the RAD does not make it possible to rebut this presumption.

[34] Moreover, I note from the additional written submissions filed with the RAD by counsel for the applicant that the RAD identified discrepancies between the applicant's testimony before the RPD and the testimony he gave before the RAD on the issue of the purpose of the demonstration on March 9, 2015. I infer from this that it expressed concern about that, as evidenced by the request made to the RAD by counsel for the applicant to give him the benefit of the doubt based, primarily, on the interpretation problems encountered before the RPD. However, I have already concluded, as the RAD did before me, that those problems did not prevent the applicant from adequately understanding the questions that he was asked or from making himself sufficiently understood. In these circumstances, I also would have hesitated, assuming that this testimonial evidence associating the demonstration on March 9 with the failure to pay student scholarships [the additional testimonial evidence] was indeed submitted to the RAD, to give it much weight.

[35] I would add that the RAD had substantial evidence before it, primarily from the applicant himself and from the most recent National Documentation Package—which was dated March 31, 2017 (the hearing before the RAD took place on May 2 and 16, 2017)—, indicating, contrary to the applicant's submissions, that, in March 2015, the Chadian students had demonstrated against mandatory helmets and had protested the scholarship problems in August of that same year. The applicant was therefore confronted, before the RAD, with this [TRANSLATION] "glaring contradiction" between his testimony before the RPD and the documentary evidence. Again, assuming that the additional testimonial evidence was indeed submitted, the RAD was entitled to choose the version it considered to be the most plausible in light of all of the evidence and the circumstances. It was not obligated to give preference to the applicant's version, as revealed by his testimony before the RAD according to his counsel (*Galamb v. Canada (Citizenship and Immigration)*, 2016 FC 1230, at paragraph 47).

[36] I note in this regard that the RAD's finding that the applicant, in submitting the Circular, had filed a false document greatly influenced its findings regarding his credibility. Yet, the applicant is not challenging that finding in this case, which I consider to weaken his position considerably.

[37] In summary, it is my opinion that, considered as a whole, the RAD's findings regarding the credibility of the applicant's story, even when considering the additional written submissions to the RAD from counsel for the applicant, fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, at paragraph 47). I therefore see no reason to intervene on this issue.

[38] The applicant’s application for judicial review will therefore be dismissed.

[39] The parties are of the view that there is no need, in this case, to certify a question for the Federal Court of Appeal. I agree with that opinion.

JUDGMENT

THE COURT ORDERS that:

1. The application for judicial review be dismissed;

2. No question is certified.

"René LeBlanc"
Judge

Certified true translation
This 29th day of November 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

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