

Federal Court



Cour fédérale

Date: 20190312

Docket: IMM-4055-18

Citation: 2019 FC 300

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, March 12, 2019

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

CLAUBERT CORVIL

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The applicant—a Haitian national—is seeking judicial review of a decision rendered by the Refugee Appeal Division [RAD] upholding a decision rendered by the Refugee Protection Division [RPD] rejecting his claim for refugee protection on the ground that it was not credible. He criticizes the RAD for failing to comply with the rules of procedural fairness and for conducting a flawed assessment of the credibility of the basis for his claim.

[2] The applicant left Haiti for Canada in late August 2016 and filed a claim for refugee protection the following month. His Basis of Claim Form [BOC Form] provides the following information:

- a. The applicant had been employed as a program officer by an NGO (J/P Haitian Relief Organization [JPHRO]) since 2014. In May 2016, the management of this organization allegedly tasked him with investigating a case of fraud involving employees of the organization. The investigation allegedly led to the dismissal of a number of employees.
- b. In the wake of the dismissals, two individuals on a motorcycle allegedly fired shots in the direction of the applicant's vehicle, as he was arriving at work, while screaming his name. The security personnel at the applicant's workplace intervened and the shooters fled. However, as they were making their escape, the shooters allegedly promised to return. That same day, on July 18, 2016, an unknown individual allegedly called the applicant on his cell phone to tell the applicant that his group was going to make him suffer so that he would understand the suffering of the dismissed employees.
- c. The next day, the applicant reportedly tendered his resignation but his employer allegedly asked him to stay until September and the applicant agreed to do so, on condition that his hours were reduced, that he be provided with alternative accommodation, other than his home, and that he be provided with security officers to escort him when he was travelling.
- d. On July 26, 2016, the applicant allegedly received another threatening phone call and this time, the caller told him that he was aware of everything and that he would eventually

find him and kill him. The applicant allegedly reported this incident to the police, who advised him to change his telephone number and limit his comings and goings.

- e. During the night of July 30 to 31, an armed commando allegedly came to his home in order to kill him, but was unable to open the gate leading to his home. However, shots were fired, and the bandits allegedly chanted the applicant's name. The next day, he had a justice of the peace come and survey the damage to his home. It was at this point that the applicant allegedly moved into accommodation provided by JPHRO.
- f. Since he only traveled in bullet-proof cars and, was escorted by security officers from then on, the applicant had allegedly finally felt safe because he now only had contact with his employees and superiors. He left Haiti for Canada on August 31, 2016.

[3] At the hearing before the RPD, the applicant expanded on his story. He stated that he had feared a group of bandits who had primarily targeted his wife and had even gone so far as to break into the family home during the night of February 27 to 28, 2016, and to fire shots. According to the applicant, a justice of the peace had come to survey the damage at his home on February 28, 2016, after he had called the police. Allegedly, these same criminals subsequently called him a dozen times to threaten him and, on one occasion, had made a death threat. Still according to the applicant, this call was reported to the police. Despite a lull, friends reportedly advised him to remain vigilant, because bandits continued to lurk in the vicinity of his home.

[4] However, the applicant did not mention these incidents in his BOC Form and the RPD tried to determine why, but was not satisfied with the explanations of the applicant, who felt that

these incidents specifically concerned his wife, even though they had also affected him, and were already reported in the BOC Form filed by his wife in support of her own claim for refugee protection, which the RPD had requested to be disclosed in the context of processing the applicant's claim for refugee protection. The applicant's explanations were deemed to lack credibility because these incidents, which had also concerned him personally, were essential to his claim for refugee protection and because the request for disclosure of information concerning his wife's claim for refugee protection was made after the applicant had signed his own BOC form. The RPD found these omissions to be fatal to the applicant's claim for refugee protection.

[5] The RPD also noted a number of other omissions in and contradictions between the applicant's testimony and his BOC Form, most notably concerning the point at which he left his job as a result of the alleged threats made against him; the date on which he allegedly moved into the apartment made available to him by his employer; the point at which he was able to rely on bodyguards; the first time that he allegedly received death threats; and the contents of the telephone conversation on July 26, 2016, when the caller allegedly told him that he would eventually find him and kill him.

[6] Finding that the applicant lacked credibility, the RPD gave little weight to the evidence presented by the applicant at the hearing. More specifically, the RPD gave no weight to the email that a friend had sent him to inform him that he had been held by two men, who had allegedly asked questions about him. Given the importance of this incident, the RPD criticized the applicant for failing to mention this in his BOC Form and even for contradicting the content of this email in his own testimony. The RPD also did not give much weight to the copy of the

complaint that the applicant allegedly filed with the police, among other things, because it contained discrepancies and because the seals affixed thereto were illegible and incomplete. Lastly, the RPD rejected the excerpts of the minutes from the court registry produced by the applicant because they were incomplete.

[7] The RPD also found that the applicant's conduct was inconsistent with the behavior of someone who feared for his life. It noted in this regard, that the applicant's wife had left the country in March 2016 and that the applicant could have done the same because he had an American visa which was valid until June 2016. The RPD did not accept the applicant's explanation that there were fewer threats against him and that his ultimate objective had been to leave Haiti for Canada.

[8] On July 25, 2018, the RAD upheld the decision rendered by the RPD after conducting an independent review of the evidence before the RPD. Like the RPD, the RAD was of the view that the numerous omissions in the applicant's BOC Form, combined with the lack of a reasonable explanation for these omissions, were fatal to his case.

[9] The RAD also noted a fact that was not discussed by the RPD, namely, that the applicant had been in possession of a Canadian visa since March 23, 2016, which, for the RAD, contradicted his claim that he had not left Haiti for the United States in the spring of 2016, at a time when he was being threatened by bandits who had first targeted his wife, who had already fled Haiti, because he intended, first and foremost, to settle in Canada.

[10] The applicant criticized the RAD for breaching the rules of procedural fairness by failing to give him an opportunity to respond to this concern, which he characterizes as a new issue. In this regard, he argues that the RAD erred in holding that it did not need to give him an opportunity to explain this contradiction since, in the view of the RAD, the issue of the Canadian visa was not a new issue, but an issue related to the applicant's credibility, and therefore related to the determinative component of this case.

[11] He also submits that the Court should intervene and refer the matter back to the RAD for reconsideration, even if, at the end of the day, this review did not change the outcome of his appeal.

[12] I cannot accept these arguments, which I must review on the basis of the standard of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43 [*Khosa*]).

[13] It goes without saying that when considering a question which was not raised before the RPD or by any of the parties to the appeal, the RAD must first notify the parties accordingly and give them an opportunity to respond thereto (*Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at para 71 [*Ching*]). However, it is now a well-established fact that when the credibility of a refugee protection claimant is at the heart of the RPD's decision and the grounds for appeal before the RAD, the RAD is entitled to make independent findings in this regard, without having to question the applicant or giving the applicant another opportunity to make submissions. That said, the RAD must avoid disregarding contradictory evidence on the record or making findings based on evidence unknown to the applicant (*Ibrahim v Canada (Citizenship*

and Immigration), 2016 FC 380 at paras 26, 30 [*Ibrahim*]; *Koffi v Canada (Citizenship and Immigration)*, 2016 FC 4 at para 38; *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 at para 24; *Marin v Canada (Citizenship and Immigration)*, 2018 FC 243 at paras 35–37 [*Rodriguez Marin*]; *Oluwaseyi Adeoye v Canada (Citizenship and Immigration)*, 2018 FC 246 at para 13 [*Adeoye*]).

[14] In this case, credibility was at the heart of the RPD's concerns and the subsequent rejection of the applicant's claim for refugee protection. It was also at the heart of the applicant's appeal to the RAD. Therefore, the RAD's independent finding regarding the date of issue of the Canadian visa affecting the applicant's credibility did not constitute a new issue, in and of itself, and did not involve contradictory evidence. Was this finding based on evidence unknown to the applicant? The answer is no, since the date of issue of the Canadian visa is clearly indicated in the record (Certified Tribunal Record [CTR] at pp 76, 102).

[15] Given the current state of the Court's case law, the RAD cannot be criticized for raising a piece of evidence on the record, but which appeared to have escaped the RPD's attention, and drawing a negative inference therefrom about the applicant's credibility, without giving the applicant an opportunity to explain himself given that the applicant's credibility was the central issue of the appeal filed by the applicant.

[16] In any event, I am satisfied that even if the matter of the date of issue of the Canadian visa is disregarded, there were sufficient grounds to justify the rejection of the applicant's appeal. As a general rule, a breach of procedural fairness will render a decision under review void;

however, this is not be the case “where the demerits of the claim are such that it would in any case be hopeless” (*Rodriguez Marin* at para 39). The issue of the Canadian visa was simply another negative inference drawn by the RPD regarding the applicant’s credibility and confirmed by the RAD, which both panels found sufficient to respectively reject the applicant’s claim for refugee protection and the appeal from this decision (CTR, RAD Decision at p 6, para 17).

[17] The decision in *Ching*, cited by the applicant in support of his argument that quashing the RAD’s decision is the only appropriate remedy in this case if the rules of procedural fairness have been breached, even if this would not change the outcome of the appeal, is of no help to him in the circumstances of the case. Indeed, in this case, the RPD found the refugee protection claimant to be generally credible, but rejected his claim on the grounds that he did not rebut the presumption of state protection and that he had taken too long to claim refugee status. For its part, although the RAD rejected the appeal, it deemed unreasonable the RPD’S findings regarding the applicant’s credibility, an issue that was not before it and which the refugee protection claimant was not given an opportunity to address. It was in this context, which is very different from the one before us, that the Court found it necessary to refer the matter back to the RAD for reconsideration of the issue of the refugee protection claimant’s credibility, even if, ultimately, this would not change the outcome of the appeal.

[18] The applicant also maintained that the RAD erred in its assessment of the issue of his credibility. Here, the applicable standard of review is that of reasonableness (*Adeoye* at para 7). This means that the Court will only intervene if the RAD’s decision fails to have the qualities that make a decision reasonable, which are “concerned mostly with the existence of justification,

transparency and intelligibility within the decision-making process. But . . . also . . . with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). Deference to the RAD’s findings concerning this issue is therefore required, and consequently, I cannot substitute my own appreciation of the facts for the RAD’s assessment (*Khosa* at para 59).

[19] The applicant argued that it was unreasonable for the RAD, and the RPD, to criticize him for failing to mention in his BOC Form the episodes of threats that preceded those documented in said BOC Form, because he believes to have provided a perfectly reasonable explanation of this omission. I recall that according to his explanation, these incidents had primarily concerned his wife and were mentioned in the refugee protection claim filed by his wife, a claim that the RPD was able to access for the purposes of reviewing the applicant’s own refugee protection claim.

[20] The RAD disposed of this argument in the following manner:

[17] In this case, like the RPD, I find that the numerous and significant omissions that were identified, for which the claimant did not provide any reasonable explanation, are fatal to this refugee protection claim. In fact, in his BOC Form, there is no mention of the various incidents of criminals who were looking for his wife, but who allegedly threatened him from February 28 until the beginning of April 2016, to the point where he had to stop working, live in a safer area and then return to work, but travel there with a driver who was a former police officer who acted as his bodyguard.

[18] This information was provided only during the hearing. When asked to explain these significant omissions, the claimant responded that this situation specifically targeted his wife, but that he was affected by this situation. He also stated that, as of the week of April 4, people from his office had contacted him, promised him that he could return to his job and that the situation had calmed down a bit because he no longer lived at the same address.

[19] I am of the opinion that these explanations are not reasonable. As the RPD pointed out, the claimant is an educated person who assumed significant responsibilities in his country and who is represented by an experienced counsel. However, at the beginning of the hearing, the claimant clearly indicated that, even if his BOC Form had not been translated for him, he understood French well enough and that the information in his BOC Form was complete, correct and up to date and that he had nothing to add. He signed his BOC Form on September 20, 2016. He then declared that the information provided was complete, true and correct and that this declaration has the same force and effect as if made under oath. In either case, no reference was made to his wife's BOC Form and, therefore, the appellant's argument on this subject cannot be accepted.

[Footnotes omitted]

[21] In my view, the RAD's position reflects the qualities of justification, transparency and intelligibility and falls within a range of possible, acceptable outcomes which are defensible in respect of the law and the facts of the case. After listening to the recording of the hearing held before the RPD, I am satisfied that it is the applicant himself who, spontaneously and voluntarily, testified about the incidents that occurred in the winter and spring of 2016, which predated the incidents described in his BOC Form. In this context, the RAD, and the RPD before it, could, in my opinion, legitimately and reasonably question why the applicant's BOC Form made absolutely no mention of these incidents, which, after a certain point, stopped concerning his wife alone, and therefore find the applicant's explanations of this omission to be unsatisfactory.

[22] The fact that the RPD had access to the BOC Form filed by the applicant's wife fails to persuade me that I should intervene since the applicant's BOC Form was signed before the RPD requested access to his wife's BOC Form. Consequently, the applicant could not have reasonably presumed, when he signed his BOC Form, that the RPD was going to consolidate his story with

his wife's story and analyze his refugee protection claim as if it included the serious incidents that had preceded those described in his BOC Form by a few weeks. Moreover, there was no guarantee that the RPD would make such a request. In any event, the applicant stated, not once but twice, that the information provided in his BOC Form was not only accurate, but also complete. The fact that he omitted to mention these incidents in this context raises more questions about his credibility than it answers.

[23] In addition, we have the RAD's finding about the date of issue of the Canadian visa and the applicant's delay in leaving Haiti even though, given that his wife had already fled the country as a result of the same events, he clearly had an opportunity to travel to Canada, as he allegedly wished to do, much sooner than he did. In my opinion, this is yet another fact that justifies, against a standard of reasonableness, the RAD's findings concerning the applicant's general credibility.

[24] There is therefore no reason to allow this application for judicial review. Neither party has proposed that a question of general importance be certified for the purpose of an appeal. I also find that there are no grounds to do so in the circumstances of this case.

JUDGMENT in IMM-4055-18

THIS COURT RULES AND ADJUDGES THAT:

1. The application for judicial review is dismissed;
2. No question is certified.

“René LeBlanc”

Judge

Certified true translation
This 29th day of May 2019.

Johanna Kratz, Translator

FEDERAL COURT
SOLICITORS OF RECORD

STYLE OF CAUSE: CLAUBERT CORVIL v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: MONTRÉAL, QUEBEC

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JUDGMENT AND REASONS: LEBLANC J.

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