Federal Court  Cour fédérale

Date: 20200313

Docket: IMM-3344-19

Citation: 2020 FC 374

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, March 13, 2020

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

BERTHONY OCCILUS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant, a Haitian national, made a claim for refugee protection in Canada on January 27, 2017, a few weeks after leaving his country of origin, where he feared for his life and security. He is challenging a decision of the Refugee Appeal Division [RAD] that upheld a decision by the Refugee Protection Division [RPD] to reject his claim for protection. Both levels found that the applicant was not credible.

[2] A lawyer by training, the applicant documented the incidents that drove him to leave Haiti in his Basis of Claim Form [BOC Form], which he amended three times prior to his hearing before the RPD to add new elements supporting his fear of returning to that country.

[3] According to his original BOC Form, he and his family began to be targeted by violence and threats in the early 2000s. In particular, he explains that one of his uncles was murdered in 2004, another of his uncles had to leave Haiti because he had been threatened, the family home was burglarized in 2006 and, during that event, a cousin of his and his father were assaulted. In 2009, he adds, his father's business was burned down. Finally, in 2016, he was allegedly attacked while leaving a bank by two individuals on motorcycles. He attributes these incidents to his family's enviable financial means but claims he does not know what led to the burning of his father's business.

[4] On March 30, 2017, a little over a month after filing his claim for refugee protection, the applicant amended his initial account, this time attributing his uncle's murder in 2004, the departure from Haiti of another of his uncles, the break-in of the family home and the fire in his father's business to the Chimères Lavalas, a group that supported the sitting president and the political regime that the applicant and his family opposed, sometimes by participating in demonstrations. He added that the Chimères Lavalas had even kidnapped his uncle's wife and demanded a ransom for her release (Certified Tribunal Record [CTR], at p 54). With respect to the attack he had allegedly suffered upon leaving a bank, the applicant added that his father was contacted after the incident by the two individuals, who allegedly threatened to kill him.

[5] On June 6, 2018, the applicant filed a new amended account, in which he explained that his sister was also threatened and attacked on her university campus. He alleged that the incident occurred in December 2017. In March 2018, the attacker returned to the campus, looking for the applicant's sister. The applicant explained that, despite the attacker's arrest, his sister preferred to take refuge in the home of a friend in the Dominican Republic. The applicant also explained that he had received several death threats in connection with his legal practice, being considered a [TRANSLATION] "cage rattler" because of his university education and his experience before the courts. He noted, however, that he had not taken these threats seriously because they were commonplace in his field of work (CTR at p 60).

[6] On June 12, 2018, the applicant amended his original account for the third time. At that point he stated that, through a police officer friend of his, he had contacted a justice of the peace after regaining consciousness following the assault he had allegedly suffered upon leaving a bank in 2016. He also filed, in support of his amended BOC Form, a new medical certificate from the facility that had provided him with medical assistance on the day of the assault, because, he claimed, the first certificate contained errors.

[7] The RPD held that these three amendments to his BOC Form undermined the applicant's credibility, being of the view that important information, such as the political problems in connection with the Chimères Lavalas, should have been in the initial BOC Form. The RPD also held that the documentary evidence submitted by the applicant in support of his claim for refugee protection—particularly the medical certificates meant to corroborate the attack he allegedly suffered in 2016 upon leaving a bank and the report of the justice of the peace meant to

corroborate the criminal nature of the fire in his father's business—also tainted his credibility, given that they contradicted his allegations instead of proving them.

[8] This decision was upheld by the RAD after it had conducted its own analysis of the evidence before the RPD.

[9] The applicant essentially argues that the RAD erred in failing to consider all of the allegations forming the basis of his claim. In particular, he criticizes the RAD for not taking into account the circumstances specific to Haiti, where jealousy and vengeance are well-known problems. He adds that the sole purpose of the amendments to his account was to render his initial allegations [TRANSLATION] "clearer and more understandable" (Applicant's Memorandum at para 17).

[10] As he had maintained before the RAD with respect to the conduct of the RPD member handling his claim for refugee protection, the applicant, in the written submissions he filed in support of his application for judicial review, also argued that the conduct of the RAD member handling his appeal created a reasonable apprehension of bias. However, he abandoned this argument at the hearing for this judicial review.

[11] The issue here is whether, in deciding as it did, the RAD committed an error warranting this Court's intervention. The parties agree that the standard of review applicable to the RAD's decision is reasonableness, given the presumption to this effect established in the Supreme Court of Canada's recent decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*,

2019 SCC 65 [*Vavilov*]). This presumption can be rebutted in two types of situations, where the legislator has clearly indicated that it intends a standard other than reasonableness to apply and where the rule of law requires that the standard of correctness be applied. This is the case for constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies (*Vavilov* at para 17).

[12] I agree that this case does not have any of the characteristics justifying a rebuttal of the presumption of reasonableness review.

[13] As for the contents of the reasonableness standard itself, I reiterate my recent comments in *Elusme v Canada (Citizenship and Immigration)*, 2020 FC 225.

[14] [15] As for the contents of the reasonableness standard itself, the respondent submits that *Vavilov* is consistent with the framework for applying that standard, set out in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], and those decisions that followed it. I generally agree with this assertion. I should just add, for the purposes of the case at bar, that, as the Supreme Court reminds us, "a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the 'range' of possible conclusions that would have been open to the decision maker, conduct a de novo analysis or seek to determine the 'correct' solution to the problem". It must "consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable" (*Vavilov* at para 83).

[15] [16] With respect to that last point, the Supreme Court points out that a court reviewing the decision of an administrative decision maker on a reasonableness standard must defer to such a decision (*Vavilov* at para 85) and must take care not to engage in a "line-by-line treasure hunt for error" (*Vavilov* at para 102).

[16] [17] At the end of the day, a reviewing court must, according to the Supreme Court, "develop an understanding of the decision maker's reasoning process" and determine "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility" (*Vavilov* at para 99).

[17] [18] However, in so doing, a reviewing court must not interfere with an administrative decision maker's findings of fact, except where there are "exceptional circumstances", such as where the decision maker "has fundamentally misapprehended or failed to account for the evidence before it" (*Vavilov* at paras 125–126). In so doing, it must always bear in mind that the written reasons given by an administrative body "must not be assessed against a standard of perfection", given that administrative justice will not always look like judicial justice (*Vavilov* at para 91). Furthermore, when assessing the quality of the decision maker's reasoning, as revealed in the reasons for its decision, it should read these in light of the history and context in which they were rendered as well as the evidence that was before the decision maker (*Vavilov* at para 94).

[18] [19] This analytical method is therefore, in my view, consistent with the principles established in *Dunsmuir*, although one must ensure that the application of these principles to a

given case aligns with those set out in *Vavilov*, the ultimate goal of which is to "develop and strengthen a culture of justification in administrative decision making" (*Vavilov* at paras 2 and 143).

[19] Applying the standard of reasonableness to the facts and circumstances of this case, I am of the view that nothing warrants this Court's intervention.

[20] It is well established that all the important facts and details of a claim must be included in the initial BOC Form, and the failure to include them can affect the refugee protection claimant's credibility (*Ogaulu v Canada (Citizenship and Immigration)*, 2019 FC 547 at para 18; *Zeferino v Canada (Citizenship and Immigration)*, 2011 FC 456 at para 31).

[21] Clearly, this is what has happened here: the RAD, and the RPD before it, judged that facts and details supposedly central to the applicant's claim had been omitted from the original BOC Form, which, in light of their importance, irremediably affected the applicant's credibility.

[22] As we have seen, while the original account linked the family's problems to its enviable financial situation, over time, fears were added in connection with the family's political activities and the actions of the Chimères Lavalas, the threats to the applicant's father following the attack on the applicant while he was leaving a bank in 2016, his visit to a justice of the peace following that incident and the threats received by the applicant in connection to his legal practice.

[23] It is risky not to disclose in the initial BOC Form all of the facts and details that are important to a claim for refugee protection, even if these facts and details are later revealed in subsequent versions of the BOC Form. A convincing explanation will then be required to justify the delay in disclosing them. In this case, the applicant argues that the facts and details disclosed in later versions of his BOC Form involved only secondary information, the purpose of which was to render the basis of his claim for refugee protection clearer and more understandable, and that they were disclosed late because he was not represented by counsel when he had completed his initial BOC Form and did not know that he was required to [TRANSLATION] "include those details" at that point (RPD Decision, CTR at p 22).

[24] The RAD, and the RPD before it, found his explanations unsatisfactory given the importance of the omissions and the fact that the applicant, himself a lawyer, could hardly have failed to understand the requirement that he provide, in his initial BOC Form, all of the important facts and details on which his claim was based. While it is certainly open to a claimant for refugee protection to amend his or her BOC Form, these amendments, according to the case law of this Court, must generally be limited to minor or secondary details of the account forming the basis of the claim for refugee protection so as not to risk impugning the claimant's credibility (*Hamidi v Canada (Citizenship and Immigration),* 2015 FC 243 at para 27).

[25] In my view, it was open to the RAD to find that these omissions were significant and did not constitute mere peripheral details. This finding, analyzed on a standard of reasonableness, fell within the range of possibilities open to the RAD and was sufficient, in my view, to undermine the credibility of the applicant's entire account. There is only so far that one can

stretch the basis of a claim through amendments to the BOC Form without tainting the claimant's credibility (*Theodor v Canada (Citizenship and Immigration)*, 2009 FC 396 at para 11; *Walite v Canada (Citizenship and Immigration)*, 2017 FC 49 at paras 53–54). In this case, the RAD judged that this limit had been surpassed. I see nothing unreasonable in this finding in light of all the circumstances of this case.

[26] It also appears that the documentary evidence filed by the applicant (report from a justice of the peace in connection with the fire in his father's business and the two medical certificates connected with the 2016 attack outside the bank) did nothing to assuage the concerns of the RAD and of the RPD before it as to the general credibility of the claimant, quite the contrary in fact.

[27] The RAD first rejected the report of the justice of the peace because it mentioned neither the Chimères Lavalas nor the fact that the fire in the business of the claimant's father was criminal in nature, while the allegation that the fire had been started by the Chimères Lavalas constituted one of the central bases of the applicant's claim.

[28] As for the medical certificates provided by the applicant, the RAD noted that he had filed a second certificate because the first contained errors. It noted in particular that the two documents came from two different physicians and clinics and that they described implausible diagnoses, such as [TRANSLATION] "blows and a very serious injury to the head" provoked by [TRANSLATION] "severe pain" and an ultimate diagnosis of [TRANSLATION] "acute pain".

[29] I find that it was reasonable for the RAD to find that this evidence, meant to corroborate certain significant portions of the applicant's account, had no probative value whatsoever and even undermined the account's credibility. I cannot accept the applicant's argument to the effect that the formulation of documents created by third parties cannot be held against him. As the burden is on him to prove the elements of his claim (*Janvier v Canada (Citizenship and Immigration)*, 2020 FC 142 at para 32; *Kinfe v Canada (Citizenship and Immigration)*, 2019 FC 286 at para 22; *Reis v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 1289 at para 11), it was up to the applicant not to present corroborating evidence that raised more questions than it answered about the credibility of his account as a whole.

[30] The omissions in the initial BOC Form, the applicant's unconvincing justifications for these omissions and the deficiencies in his corroborating evidence are many, and in my view, they support the reasonableness of the RAD's decision. I therefore see no reason to intervene in this case or set aside the decision as the applicant has requested.

[31] This application for judicial review is therefore dismissed. Neither party has proposed a question for certification for an appeal.

JUDGMENT in IMM-3344-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. No question is certified.

"René LeBlanc"
Judge

Certified true translation
This 15th day of April 2020.

Johanna Kratz, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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