Federal Court  Cour fédérale

Date: 20201106

Dockets: IMM-1663-19

Citation: 2020 FC 1036

Ottawa, Ontario, November 6, 2020

PRESENT: Mr. Justice McHaffie

BETWEEN:

MAHAMAT ZAKARIA MAHADJIR DJIBRINE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Refugee Appeal Division (RAD) of the Immigration and Refugee Board refused to reopen the Applicant's appeal of his claim for refugee protection. The RAD rejected the Applicant's argument that his former counsel's incompetence caused a breach of a principle of natural justice. For the reasons set out herein, I conclude that the RAD's refusal to reopen the

appeal was unreasonable because it failed to address the arguments and evidence put forward by the Applicant regarding counsel's competence, preferring to focus on other aspects of counsel's performance. The RAD also unreasonably relied on new credibility findings that were not supported by the record.

[2] This application for judicial review is therefore granted. In keeping with the approach taken by Justice Barnes in *Etik v Canada (Citizenship and Immigration)*, 2019 FC 762 at para 1, I will hold in abeyance the Applicant's application for judicial review of the RAD's original decision, brought in Court File No IMM-4927-18, which was heard at the same time as this application.

II. Issue and Standard of Review

[3] The only issue on this application for judicial review is whether the RAD's refusal of the Applicant's request to reopen the appeal was reasonable. The request to reopen was brought under Rule 49 of the *Refugee Appeal Division Rules*, SOR/2012-257 [*RAD Rules*]. That section states that the RAD must not allow an application to reopen "unless it is established that there was a failure to observe a principle of natural justice": *RAD Rules*, Rule 49(6).

[4] A request to reopen therefore involves an assessment of whether there has been a breach of natural justice. Nonetheless, what is being addressed on this application is not the existence of a failure to observe a principle of natural justice in the original hearing before the RAD (which is raised in Court File No IMM-4927-18), but a challenge to the RAD's determination on the request to reopen that there had not been such a breach. This Court has concluded in a number of

cases that the latter determination is subject to review on the reasonableness standard: *Brown v Canada (Citizenship and Immigration)*, 2018 FC 1103 at paras 24–26 [*Brown (2018)*]; *Khakpour v Canada (Citizenship and Immigration)*, 2016 FC 25 at para 20. The parties agree that the reasonableness standard applies. I note that this is not a case where there is an allegation that the RAD failed to observe a principle of natural justice on the reopening application itself: *Brown (2018)* at para 26.

[5] The nature of reasonableness review has been recently described by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, including notably at paragraphs 81–87, 91, 96, 99–102, 105, and 125–128 of that decision. Of particular importance in this case are the concept of "responsive reasons" which meaningfully account for the central issues raised by a party, and the need for reasons to be rational and justified in light of the evidence: *Vavilov* at paras 86–87, 125–128.

III. Analysis

[6] I make two preliminary notes on nomenclature. First, in his affidavit filed on this application, the Applicant states that his first name is Djibrine, and his family name is Mahadjir. This is consistent with the narrative in his Basis of Claim (BOC), in which he introduces himself as Djibrine Mahamat Zakaria Mahadjir. However, the style of cause in this matter and the RAD's decision suggest the Applicant's family name is Djibrine, and some of the documents refer to the Applicant as "Mr. Djibrine." At the hearing, this issue was discussed and the parties were asked whether an amendment to the style of cause was necessary. Counsel for the Applicant subsequently wrote to the Court advising that no change to the style of cause was

requested. No amendment will therefore be made, but to avoid potentially compounding an error, I will simply refer to "the Applicant" in these reasons.

[7] Second, the Applicant has been represented by three different counsel in respect of his refugee claim. As described further below, the first assisted in preparation of the claim, but withdrew on the first day of the refugee hearing. The second represented the Applicant during the Applicant's hearing before the Refugee Protection Division (RPD) and his appeal to the RAD. The third represented the Applicant on his application to reopen and on his two applications for judicial review. I will refer to them as "first counsel," "second counsel," and "third counsel" to avoid confusion and to avoid using the names of first and second counsel, against whom allegations of incompetence have been made.

A. *Refusal of the Applicant's Claim for Refugee Protection*

[8] The Applicant is a citizen of Chad who was born in Saudi Arabia. He grew up in Saudi Arabia, but was deported in 2016 as a young adult after his Saudi residence permit expired. He claims that upon his return, Chadian authorities detained and interrogated him for five days and then transferred him to a prison where he was kept for 20 days. His maternal uncle managed to get him out of prison by paying off prison officials. He stayed in hiding for five months until his uncle was able to coordinate his departure from Chad. He travelled to the United States, where he stayed for about three months before coming to Canada, where he sought refugee protection. He fears that he would again be persecuted, arrested, tortured, or even killed if returned to Chad.

[9] The Applicant's BOC filed in support of his application attached a narrative that contained the above information, identifying the person he hid with in Chad as his "grandmother." It did not, however, give the reason he was detained in Chad, which he contends is because his father was formerly a politically active opponent of the Chadian government. The Applicant also filed a brief letter from his father that confirmed that the Applicant had been deported from Saudi Arabia and arrested and held in Chad until his uncle was able to arrange his release, and that the same uncle had recently died. As with the BOC narrative, the letter did not mention the father's political activities or refer to them as the reason for the arrest and detention.

[10] At the time the BOC narrative was prepared and the letter obtained, the Applicant was represented by first counsel. In an affidavit filed with the RAD on the reopening application, the Applicant states that the BOC form and narrative were prepared after a meeting with a translator arranged by the first counsel. He states that his first counsel did not review the BOC narrative with him, and that he had problems with the translator, who advised against including information about his father's political involvement in the letter.

[11] First counsel withdrew from representing the Applicant on the first day of his refugee hearing. That hearing was adjourned owing to difficulties understanding the interpreter, who was the same interpreter who had interpreted the BOC. The Applicant then retained his second counsel, who represented him at his RPD hearing and in his appeal before the RAD.

[12] At the reconvened refugee hearing, the Applicant gave evidence about, among other things, the reasons for his detention, namely his father's political opposition. He testified that he

learned this fact from his uncle after his detention. His father later confirmed to him in a conversation a few weeks before the hearing that he had been an opposition party supporter. He also testified that he had no family in Chad, that his uncle had died, and that the "grandmother" referred to in his BOC was in fact the sister of the father of his uncle. After the hearing, the Applicant filed three further documents through his second counsel, namely a translated copy of his Saudi residence permit, a medical certificate regarding his uncle's death, and a copy of his old passport.

[13] The RPD rejected the Applicant's refugee claim on grounds of credibility. The adverse credibility finding was based primarily on three grounds: the fact that the reason for his detention was not mentioned in either his BOC narrative or his father's letter, even after the BOC had been amended to correct some dates; a finding that the Applicant had claimed to have learned the reasons for his detention from his uncle after his uncle's death; and the Applicant's evidence that he did not have "family" in Chad, even though he said he had stayed in hiding with his grandmother.

[14] The Applicant, represented by the same second counsel, appealed the RPD's decision to the RAD pursuant to section 110 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The written submissions filed by counsel on that appeal were somewhat under two pages in length. They identified seven errors on the part of the RPD. Some of these were more specific, making reference to, for example, the "manner in which the Applicant referred to elderly persons" (understood by the RAD as a reference to the "grandmother" issue). Others were stated more broadly, such as the contention that the credibility determinations were based on "minor

contradictions or probably due to inexact translations," and that the decision was "capricious arbitrary and contrary to the jurisprudence." The submissions identified four paragraphs in the decision where the alleged errors were located. The argument with respect to the grounds were set out in five bullet points, which can be translated as follows:

> - The applicant presented documents to support his claims;
> - The determination of falsity or omission of consideration by the [RPD] is unreasonable and constitutes a breach of the duty to act fairly;
> - The Applicant is a young man with little education from an African family with little instruction or knowledge about formalities;
> - The Applicant presented documents in his possession that gave no indication of having been falsified;
> - The documents submitted in support show that he underwent an arbitrary arrest and that his uncle was dead.

[15] The RAD dismissed the appeal, upholding the RPD's credibility findings. The RAD upheld the RPD's conclusions that the Applicant had said that he learned the information from his uncle at a time after the uncle had died; that the addition of new information about the reason for the detention at the hearing greatly undermined the Applicant's credibility; and that his credibility was also considerably undermined by the failure to mention his "grandmother" when asked about his family. The RAD also noted that the Applicant gave short and evasive responses to explain the reason for his detention.

[16] The Applicant brought an application for leave and judicial review of the RAD's decision, in Court File No IMM-4927-18. By order of Prothonotary Aalto dated

November 7, 2018 that application was held in abeyance pending the RAD's determination of the Applicant's application to the RAD to reopen the appeal.

B. *Request to Reopen Based on Allegations of Counsel Incompetence*

[17] The Applicant, represented by new counsel, who I will term "third counsel," applied to reopen the appeal under Rule 49 of the *RAD Rules*. The Applicant raised allegations of incompetence on the part of second counsel with respect to both his representation before the RPD and in the appeal to the RAD.

[18] As the parties agree, incompetence on the part of counsel representing a refugee claimant may amount, in extraordinary circumstances, to a failure to observe a principle of natural justice or a breach of procedural fairness: *Brown v Canada (Citizenship and Immigration)*, 2012 FC 1305 at paras 30, 55–56, 59 [*Brown (2012)*]; *Galyas v Canada (Citizenship and Immigration)*, 2013 FC 250 at paras 83–84; *RAD Rules*, Rule 49(1), (4). To establish such a breach, an applicant must establish that counsel's acts or omissions constituted incompetence, and that a miscarriage of justice resulted: *R v GDB*, 2000 SCC 22 at para 26; *Brown (2012)* at para 55; *Galyas* at paras 31, 84. They must also provide former counsel with an opportunity to respond to the allegations: *Brown (2012)* at para 57; *Galyas* at para 84; *RAD Rules*, Rule 49(4).

[19] With respect to the representation before the RPD, the Applicant says that his second counsel did not provide competent advice with respect to his BOC narrative and the preparation of supporting evidence for the RPD hearing. Although the BOC narrative and his father's letter were prepared when the Applicant was represented by his first counsel, he argues his second

counsel ought to have immediately recognized their shortcomings, notably with respect to the absence of a reason for the detention. The Applicant argues second counsel ought to have reviewed the BOC narrative with the Applicant, which would have resulted in further information regarding the reasons for detention, and would have clarified the concern regarding the use of the term “grandmother.” The Applicant further argues that competent counsel would have asked the Applicant if he suffered any physical or mental injuries as a result of his detention, and obtained medical evidence to this effect.

[20] With respect to the RAD appeal, the Applicant criticizes both the preparation for the appeal and the submissions filed. He says that counsel failed to competently prepare for the appeal by failing to discuss with him the RPD’s adverse credibility findings based on his family members. Had counsel done so, he could have explained the apparent concerns about his family by adducing new evidence or argument on appeal.

[21] With respect to the submissions filed, the Applicant argues generally that they were brief and inadequate, and specifically that it was incompetent not to present arguments to the RAD that: (i) his testimony regarding his relatives was not in fact inconsistent as the RPD had found; (ii) the RPD clearly erred by finding the Applicant claimed to have had a discussion with his uncle after his death, when the evidence in question clearly related to a conversation with his father; and (iii) the RPD erred in dismissing the uncle’s death certificate based on a typographical error.

[22] In support of the reopening application, the Applicant filed an affidavit stating, among other things, that he had explained his understanding of the reasons for his detention to his second counsel before the RPD hearing, who said he would add it to the Applicant's story. He also provided an explanation of the term "grandmother," suggesting it was an incorrect description of the individual, who was the widow (not sister) of his uncle's father but not his uncle's mother. The Applicant further testified that he did not understand the reasons his claim had been refused by the RPD until his current third counsel summarized them, and that his conversation with his second counsel after the RPD decision was limited to the possibility of appeal, and an indication that the claim was refused based on "problems with dates and they didn't believe me."

[23] In addition to his affidavit, on the reopening application the Applicant filed a much longer and more detailed letter from his father; a letter from a social services agency (PRAIDA) that confirmed he had raised concerns about his first counsel, the interpreter, and the preparation of his BOC the day before the initial refugee hearing; medical evidence that spoke to injuries consistent with his allegations of beatings in detention; and a psychological report stating that he satisfied diagnostic criteria for major depressive disorder of moderate severity with mood-congruent psychotic features.

[24] Although the Applicant's arguments focused on the competence of his second counsel, he put both of his former lawyers on notice of his allegations of inadequate representation in accordance with the requirements of Rule 49(4) of the *RAD Rules*. The Applicant's first counsel

provided no response. His second counsel provided a reply that denied the allegations and provided information regarding his representation of the Applicant.

[25] In particular, second counsel noted that the preparation interview before the RPD hearing took over an hour, during which he had to repeatedly insist that the Applicant tell his story and explain details. Second counsel states that he asked several questions about the Applicant's detention, imprisonment, and release, and how he obtained a visa if he was being sought by authorities. He also states that he insisted on an explanation of the relationship of the Applicant's uncle to his parents and the woman identified as his grandmother. Second counsel indicated that the Applicant "knew very little of the political situation in Chad and of his father's alleged previous political involvement." Second counsel's reply did not address the preparation for or submission of the appeal to the RAD.

[26] Second counsel's reply statement states that he took over four pages of notes at the meeting before the RPD hearing, and that he had attached those notes to the statement. However, the attachment provided to the RAD only contained a single page of notes, copied twice. Third counsel for the Applicant noted this discrepancy in a reply filed with the RAD and copied to second counsel. No further response or correction was provided by second counsel.

[27] I note that second counsel filed an affidavit on a motion to intervene in the Applicant's application for judicial review of the RAD's initial decision (IMM-4927-18). By order dated May 14, 2019, Prothonotary Furlanetto dismissed the intervention motion as premature, without prejudice to second counsel's right to seek to intervene if leave was granted on the judicial

review application. However, the affidavit filed in support of the motion was accepted as second counsel's response to the further notice he was given pursuant to this Court's March 7, 2014 protocol *Re: Allegations Against Counsel or Other Authorized Representative in Citizenship, Immigration and Protected Person Cases before the Federal Court*. The affidavit was put before the Court on this application, and the two applications were argued together before me and taken under reserve.

[28] Since this affidavit from second counsel was not before the RAD, it cannot bear on the reasonableness of the RAD's decision on the reopening application: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19–20. I will therefore not refer to it for the purposes of assessing the reasonableness of the RAD's decision. Similarly, I will not refer to the Applicant's new affidavit filed on this application, although that affidavit largely just repeated his affidavit filed before the RAD.

C. *The RAD's Decision on the Reopening Application was Unreasonable*

[29] The RAD concluded that the Applicant had not demonstrated incompetence by his second counsel. The RAD provided four main reasons for this conclusion: (i) the Applicant himself swore to the truth and completeness of the BOC narrative prepared by his first counsel, for which he could not blame his second counsel; (ii) the evidence revealed a number of new grounds for a credibility finding not previously raised by either the RPD or the RAD, namely a box checked on an immigration form (IMM 5669), an asserted inconsistency in the Applicant's evidence about his and his uncle's involvement in obtaining an American travel visa, and his delay in leaving the United States for Canada; (iii) second counsel was professional in asking

questions and making submissions at the RPD hearing, and filing further documents after the hearing; and (iv) the Applicant still retained his second counsel for the RAD appeal, which was difficult to understand if he had so badly represented the Applicant before the RAD.

[30] I agree with the Applicant that the RAD's decision did not address the very arguments regarding second counsel's competence that were raised on the application to reopen. The RAD did not address the allegation that second counsel was incompetent in failing to ensure that the Applicant's BOC was complete, including through addressing the reasons for his detention. The Applicant had given evidence that the BOC had not been translated for him, and that he understood his second counsel would be revising the BOC. In such circumstances, it was insufficient for the RAD to simply point to the Applicant's signature on the BOC or his statement at the outset of his evidence that it was "complete and true" as overcoming any allegation of counsel incompetence. As the Applicant points out, this Court has found counsel incompetent in a number of cases for failing to ensure an adequate BOC was filed, even though the BOC would have necessarily been signed by the claimant: *Guadron v Canada (Citizenship and Immigration)*, 2014 FC 1092 at paras 18–19; *Galyas* at paras 86–88; *Memari v Canada (Citizenship and Immigration)*, 2010 FC 1196 at paras 38–39, 45.

[31] Nor did the RAD consider or address the allegation that counsel had failed to ask the questions and obtain the necessary evidence to support the Applicant's claim. By way of example, the Applicant points to the lack of medical evidence to corroborate his allegation that he was beaten when imprisoned in Chad. The Applicant obtained a medical report subsequent to the appeal, and argued that the absence of such corroborative evidence was due to the ill advice

of second counsel. The RAD did not assess this allegation, beyond making reference to the professionalism of counsel in asking questions at the hearing, making submissions, and filing some documents. I agree with the Applicant that this is no response to an allegation that relevant supporting documents could have and should have been obtained by competent counsel. Professionalism at a hearing may not be able to make up for a lack of diligence in preparing for it. Nor did the RAD address the differences in the versions of events described by the Applicant and his second counsel, to the extent that the RAD did not take notice of the fact that only a quarter of the notes from the pre-RPD hearing interview were attached to second counsel's response.

[32] The RAD also did not address the Applicant's allegations that his second counsel failed to adequately prepare for the appeal to the RAD and lacked competence in the adequacy of material filed before the RAD. Notably, second counsel's reply to the allegations did not refer to his preparation for and conduct of the appeal despite the allegations that pertained directly to that issue. The RAD's only observation about the appeal was its statement that the Applicant continued to retain second counsel for the appeal, which was difficult to understand if his representation before the RPD had been as poor as alleged. In addition to not being responsive to the Applicant's arguments, this observation disregards the Applicant's evidence that he did not know he was inadequately represented until he retained his third counsel, and did not even have a full understanding of the reasons for the RPD's decision.

[33] The Supreme Court of Canada in *Vavilov* underscored the importance of "responsive reasons" that show the decision maker "actually *listened* to the parties" [emphasis in original]:

Vavilov at para 127. While an administrative decision cannot be expected to respond to every line of argument, the principles of justification and transparency require a decision to "meaningfully account for the central issues and concerns raised by the parties": *Vavilov* at paras 127–128. The RAD's reasons failed to do that by failing to address the main allegations of incompetence raised by the Applicant.

[34] I also agree with the Applicant that the reasons that the RAD did provide do not show "intelligible and rational reasoning" as required for a reasonable decision: *Vavilov* at paras 86–88. As noted above, relying on what counsel did do competently does not rationally or reasonably respond to allegations of what they did incompetently. As the Applicant submitted, he did not argue that second counsel did everything incompetently, but that he failed to provide competent representation with respect to a number of important matters that prejudiced the Applicant.

[35] The RAD's reliance on new grounds on which an adverse credibility finding might be made is similarly not justifiable. I question whether an application to reopen an appeal based on counsel's incompetence can be refused on the basis of finding new credibility issues that were not previously identified by either the RPD or the RAD, and on which no party had made submissions. In any case, the reasoning of the RAD on these three issues was unsound.

[36] With respect to the box checked on the IMM 5669 form, the question on the form was whether the Applicant had ever been "detained, incarcerated or put in jail." The form asks this question in the context of a series of questions related to matters such as the Applicant's prior

criminal conduct, his prior refusal of admission to Canada, and his prior involvement in genocide. These are matters that go generally to grounds of inadmissibility or exclusion from refugee protection. Even if the Applicant understood the question about being "detained, incarcerated or put in jail" in this context to encompass instances of unlawful detention that formed the basis for his refugee claim, this Court has cautioned against placing undue reliance on forms completed at a port of entry: *Wu v Canada (Citizenship and Immigration)*, 2010 FC 1102 at para 16. This is particularly so given that this form itself indicates that the Applicant could not communicate in English or French, that the interview was conducted in Arabic with the assistance of an interpreter, and that the form was not put to the Applicant by the RPD. The RAD gave no consideration to these issues.

[37] With respect to the alleged inconsistency regarding the Applicant's involvement in obtaining documents, the RAD appears to have misunderstood or mischaracterized the evidence. The RAD purports to juxtapose the Applicant's statement that his uncle did everything to get his documents against the fact that the Applicant went to the American Embassy twice for fingerprinting to get his visa. However, the Applicant did not claim that his uncle did everything in respect of getting his American visa. He said that his uncle did everything, and he did nothing, in response to questions about his Chadian certificate of nationality, identity card, and passport. When asked about the American visa, he stated that he went to the American Embassy, as the RAD itself recognized. Further, the RAD's reference to the Applicant having visited the Embassy in his uncle's car with tinted windows appears to conflate his evidence with respect to his trip to the Embassy and his evidence about his drive to the airport. Having reviewed the

transcript of evidence, I agree with the Applicant's submission that the "RAD alleges an inconsistence when in fact none exists."

[38] Finally, with respect to the fact that the Applicant did not make a refugee claim in the United States, the RAD noted that the RPD did not address this question. However, the RAD stated that [translation] "[i]n my view, the applicant certainly cannot blame his lawyer for having badly represented him on this question," which is not something the Applicant tried to do.

[39] The Minister suggests that the RAD's observations on these grounds constituted a reasonable conclusion that regardless of any concern about the BOC, the outcome would have been the same. In other words, regardless of any incompetence, there was no prejudice and thus no miscarriage of justice, such that the second requirement of an argument based on competence of counsel was not made out: *Brown (2012)* at para 30; *GDB* at para 26. I cannot accept this argument, for two reasons. First, the RAD made no reference to the issue of prejudice or miscarriage of justice. To the contrary, the RAD cited these examples expressly in assessing whether there was a lack of competence, rather than assessing whether any such incompetence mattered. As the Supreme Court has noted, while the Court should read a decision holistically and contextually, seeking to understand the reasoning process of the decision maker, it should not fashion its own reasons in place of those actually given: *Vavilov* at paras 84–86, 96–97.

[40] Second, if the RAD were assessing whether counsel's incompetence resulted in a miscarriage of justice, they would have had to assess whether counsel's performance resulted in procedural unfairness, whether the reliability of the trial's result may have been compromised, or

whether the outcome might be affected: *GDB* at paras 28, 35. Such an assessment could not be undertaken simply through the identification of other potential issues of credibility without an assessment of whether those issues would or could have been affected by the consideration of other corroborative evidence, such as that presented by the Applicant on the reopening application. The RAD undertook no such assessment.

[41] I therefore conclude that the RAD's refusal of the application to reopen was unreasonable, as it failed to adequately address the central allegations of incompetence made by the Applicant, and the material evidence pertaining to those allegations. It instead reached its decision based on the irrelevant assessment of whether counsel was competent in some aspects of their representation, and on questionable additional findings of credibility not made by either the RPD or the RAD.

[42] I note for clarity that in reaching this conclusion, I make no determinations with respect to the merits of the allegations of incompetence on the part of second counsel, or whether there was a breach of the principles of natural justice. Those determinations are to be made by the RAD on redetermination, upon proper consideration of the Applicant's arguments and evidence.

IV. Conclusion

[43] The application for judicial review is therefore allowed. The dismissal of the Applicant's application to reopen his appeal is quashed, and that application shall be redetermined by a different member of the RAD.

[44] As noted above, this application was argued at the same time as the Applicant's application for judicial review of the original decision of the RAD, in Court File No IMM-4927-18. Depending on the outcome of the RAD's redetermination of the request to reopen, the challenge to the underlying decision may become moot. Conversely, if I were to render judgment in the other matter, this could potentially trigger the application of section 171.1 of the *IRPA* and interfere with the redetermination. I will therefore hold the application in Court File No IMM-4927-18 in abeyance pending the redetermination of the request to reopen: *Etik* at para 1. If the RAD does not reopen the appeal, then subject to any challenge to that decision that may be brought to this Court, I will deal with the other matter on the merits.

[45] Neither party proposed a question for certification. I agree that none arises in the matter.

JUDGMENT IN IMM-1663-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed and the Applicant's application to reopen his appeal before the Refugee Appeal Division is remitted to be redetermined by another member of the Refugee Appeal Division.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1663-19
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